

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1913~~ 1914

No. ~~103~~ 104

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 20, 1918.

(23,513)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 435.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY,
APPELLANT,

vs.

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INDEX.

	Original. Print	
Petition	1	1
Agreement of February 24, 1908.....	4	4
Specifications, &c.....	12	12
Answer and cross-petition.....	81	81
Claimant's replication and answer to set-off.....	85	83
Argument and submission.....	87	83
Findings of fact.....	88	84
Conclusion of law.....	90	86
Opinion	90	86
Judgment	95	90
Application for and allowance of appeal.....	96	91
Clerk's certificate.....	97	91



In the Court of Claims

No. 31281.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY,
Claimant,

v.

UNITED STATES OF AMERICA, *Defendant.*

(Petition filed December 20, 1911.)

To the Court of Claims of the United States:

The Maryland Steel Company of Baltimore County respectfully states as follows:

1. The Maryland Steel Company of Baltimore County is a corporation duly organized under the laws of the State of Maryland, and makes and files this petition in its own right.

2. Heretofore, to wit, on the 24th day of February, in the year 1908, the claimant entered into a written contract with the defendant in and by which it was covenanted and agreed that in accordance with the advertisement and specifications attached to said written contract the claim-

ant should furnish all the necessary labor and material to build and should build one steel hull, twin screw, suction dredge, furnish and install in the dredge the propelling machinery, pumping machinery, and electric light plant, and all other machinery and other parts required to be installed; all work to be prosecuted faithfully and diligently and the dredge when complete in every respect should be delivered to the defendant at Sparrow's Point, in the State of Maryland.

3. And in and by said contract the defendant covenanted and agreed with the claimant that said defendant would pay to the claimant in full payment for said above described work completed and accepted by the defendant after the final trial provided by said specifications the sum of three hundred and fifty-seven thousand and five hundred dollars.

4. A copy of said contract is hereto attached, together with the advertisement and specifications therein referred to, and prayed to be taken as part hereof as if the same had been fully at large set forth herein.

5. The claimant did furnish the necessary labor and material, and did build, furnish and install said hull and machinery and plant, and do all the claimant had agreed to do under the terms and as required by said contract, all of which labor, material, work and construction were duly accepted by the defendant on the 6th day of January in the year 1909, and thereupon the claimant became and was entitled to receive the money due therefor. The defendant from time to time paid the claimant as required by the terms of said contract with the exception of four thousand seven hundred and fifty dollars, which amount is now justly due and owing to the claimant from and by the defendant, exclusive of all set-offs and just grounds of defense,

with interest thereon from the 4th day of November in the year 1908.

6. There has been no action on the above set forth claim by the Congress, but it has been disallowed by the Auditor for the War Department. The claimant is the sole owner of said claim, and solely interested therein; no assignment or transfer of said claim or any part thereof or interest therein has been made; said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and off-sets; the claimant, a corporation duly organized under the laws of the State of Maryland, has at all times borne true allegiance to the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the said Government; and the facts stated in the above petition are true.

MARYLAND STEEL COMPANY OF
BALTIMORE COUNTY,
By F. W. WOOD, *Prest.*

ALEXANDER PRESTON,
WALTER D. DAVIDGE,
Attorneys for Claimant.

City and County of Baltimore, }
State of Maryland, } ss:

I do solemnly swear that I am the agent and Attorney in fact of the Maryland Steel Company of Baltimore County, the claimant in the above petition, that I have read the said petition and the facts therein stated are true.

F. W. WOOD, *Prest.*

Subscribed and sworn to before me this 11th day of November, 1911.

(Notarial Seal) JOHN H. K. SHANNAHAN, JR.,
Notary Public.

FORM 19.*

*(To be used when the specifications call for liquidated damages.)

1. This Agreement entered into this Twenty-fourth day of February, nineteen hundred and eight, between Major J. C. Sanford, Corps of Engineers, United States Army, of the first part, and Maryland Steel Company of Baltimore County, of Sparrow's Point, in the County of Baltimore, State of Maryland, of the second part, WITNESSETH, that, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Major J. C. Sanford, for and in behalf of the United States of America, and the said Maryland Steel Company of Baltimore County, do covenant and agree, to and with each other, as follows:

In accordance with its written proposal dated February 10th, 1908, the said Maryland Steel Company of Baltimore County shall furnish all the necessary labor and material, except as specified in the specifications to be furnished by the United States, and build one steel hull twin-screw suction dredge, furnish and install in the dredge the propelling machinery, pumping machinery, and electric light plant, and all other machinery and other parts required to be installed, all work to be prosecuted faithfully and diligently, and the dredge when complete in every respect shall be delivered to the United States at Sparrow's Point, Maryland; all in strict accordance with the conditions and requirements of the specifications hereunto attached.

The said Maryland Steel Company of Baltimore County shall receive in full payment for the above described work completed and accepted on the part of the United States, after the final trial of the machinery required by paragraph 236 of the specifications, the sum of Three Hundred

Fifty-Seven Thousand, Five Hundred Dollars (\$357,500), in accordance with this agreement.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence the work herein contracted for within ten (10) days after date of notification of approval of the contract by the Chief of Engineers, U. S. Army, and shall complete the same within nine (9) months from the date of notification of approval of contract, including time necessary for trials as described in said specifications, except final trial of machinery.

4. If the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party of the second part, and upon the giving of such notice all payments to the party of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right

to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice of the party of the first part shall be authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in Section 3709 of the Revised Statutes of the United States.

5. It is further expressly understood and agreed that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and they are hereby agreed upon, liquidated, and fixed at the sum of seventy-five (75) dollars for each and every day the party of the second part shall delay in the completion of this contract, and the party of the second part hereby agrees to pay to the United States as liquidated damages, and not by way of penalty, the sum of seventy-five (75) dollars for each and every day the party of the second part shall delay in the completion of this contract, said delay not being the fault of the party of the first part.

It is further understood and agreed that the United

States shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United States during the period of delay, and also a reasonable value of any labor and materials which may be furnished by the party of the first part to the party of the second part during the time the latter is proceeding under this contract. And the party of the first part may deduct or retain all of the above-mentioned sums out of or from any money or reserved percentages that may be due or become due the party of the second part under this agreement.

Provided, however, that if the party of the second part shall by strikes, epidemics, local or State quarantine restrictions, or by abnormal force or violence of the elements, be actually prevented from completing the work or delivering the materials at the time agreed upon in this contract, and such delay is without contributory negligence on his or their part, such additional time may, with the prior sanction of the Chief of Engineers, be allowed him or them, in writing, for such completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance or extension shall in no manner affect the rights or obligations of the parties under the contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work,

then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided*, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold

and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said party of the second part are reserved to the United States.

13. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.*

But this stipulation, so far as it relates to members of or Delegates to Congress, is not to be construed to extend to this contract.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

*NOTE.—Here add to any contract made with an incorporated company for its general benefit the following words, viz: "But this stipulation, so far as it relates to Member of or Delegates to Congress, is not to be construed to extend to this contract." —See Sec. 3740, Revised Statutes.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

WITNESSES:

(Signed) J. M. HOODNER as to (Signed) J. C. SANFORD,
Major, Corps of Engineers, U. S. Army.

Attest: As to MARYLAND STEEL COMPANY OF
BALTIMORE COUNTY,
by F. W. WOOD, *President.*

(Signed) FRANK TENNEY, *Secretary.*

(Executed in triplicate.)

Approved: March 21st, 1908.

(Signed) A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

†I do solemnly swear that the copy of contract hereto annexed is an exact copy of a contract made by me personally with; that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said or any other person; and that the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

.....
.....*Corps of Engineers.*

Subscribed and sworn to before me this.....
day of, 190

.....
.....

†NOTE.—This affidavit is required only on the quintuplicate copy of contract intended for the Returns Office, Department of the Interior.—A. R. 561.

‡I certify that the award of the foregoing contract was made to the lowest responsible bidder for the best and most suitable articles and service, on proposals received in response to advertisement hereto attached, which was published for days by §..... and that further advertisement was impracticable.

.....
Corps of Engineers, Contracting Officer.

‡NOTE.—Certificate to be given by the contracting officer on the copies of the contract for the Chief of Engineers and the Auditor for the War Department.

§NOTE.—Insert "Newspaper" or "Poster and circular letter," etc., as the case may be.

NOTE.—The copy of contract for the Bureau must be accompanied with an abstract of the bids, and copy of each bid and advertisement, unless previously furnished.—A. R. 547.

NOTE.—The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or a corporation, should be inserted in and signed to the contract. An officer of a corporation, a partner, or an agent signing for the principal should add his name and designation after the word "by" and under the name of the principal; and an agent of the principal or an officer, if the principal be a corporation, should file evidence of his authority.

FORM 19.

Authorized April 30, 1896.

With Amendments to June 12, 1905.

ARTICLES OF AGREEMENT

Entered into....., 190 ,
 between
of the one part,
 and
of the other part,
 for

IMPROVING GALVESTON HARBOR, TEXAS.

SEA-GOING SUCTION DREDGE FOR GALVESTON HARBOR.

Advertisement.

U. S. ENGINEER OFFICE, 815 Witherspoon Building.

PHILADELPHIA, PA., Jan. 15, 1908.

Sealed proposals for constructing one steel, twin-screw suction dredge for Galveston Harbor, Texas, will be received here until 2.30 P. M., Feb. 14, 1908, and then publicly opened. Information furnished on application.

J. C. SANFORD,
Major, Engrs.

GENERAL SPECIFICATIONS.

1. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed. At the option of bidders certified checks for the amount of the guaranty required may be furnished in place of the guaranty.

2. All bids and guaranties must be made in duplicate upon printed forms to be obtained at this office.

3. Each guarantor will justify in the sum of forty thousand (40,000) dollars. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

4. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of one hundred twenty-five thousand (125,000) dollars within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract, which will provide for liquidated damages in an amount of seventy-five (75) dollars per day for any period of delay beyond the time agreed upon for completion.

5. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for constructing dredge, to be opened Feb. 14, 1908," and inclosed in another sealed envelope addressed to Major J. C. Sanford, Corps of Engineers, U. S. A., 815 Witherspoon Building, Philadelphia, Pa., but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

6. Whenever the term "Engineer" is used in the specifications it is understood to refer to the officer of the Corps of Engineers, U. S. Army, in charge of the work. He will be represented on the work by as many assistants as may be necessary. Whenever the term "contractor" is used it is understood to refer to the second party to the contract. Subcontractors, as such, will not be recognized.

7. It is understood and agreed that the quantities given

in these specifications are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

8. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

9. It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant, and materials, and for any damage or injury done by or to them from any source or cause.

10. In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

11. The contractor will be required to discharge any employee who, in the opinion of the Engineer, is objectionable or incompetent. Such discharge shall not be made the basis of any claim for compensation or damages against the United States or any of its officers or agents.

12. The contractor must at all times either be personally present upon the work or be represented thereon by a responsible agent, who shall be clothed with full authority to act for him in all cases and to carry out any instructions relative to the work which may be given by the Engineer, either personally or through an authorized representative.

13. No work shall be done on Sunday or legal National holidays, except in cases of extraordinary emergency.

14. The contractor will be required to commence work under the contract within ten (10) days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with

faithfulness and energy, and to complete it within the times stated in his proposal.

15. The decision of the Engineer as to quality and quantity shall be final.

16. Payments will be made as provided in paragraph 239.

SPECIAL CONDITIONS.

HULL.

The hull of the dredge, as well as the bins, shall be of steel.

17. *Dimensions*.—Length over all 304 feet.
 Length between perpen-
 diculars 290 feet.
 Moulded beam 51 feet.
 Moulded depth 27 feet.

18. *Material*.—The hull shall be constructed to conform in every respect with the rules and regulations of the American Bureau of Shipping for vessels of the first class unless otherwise specified; and all material used shall withstand successfully the test prescribed by said rules. The expense of testing the material, except salary and traveling expenses of inspector, will be paid by contractor. In gauging the thickness of plates, measurements will be made at each corner and throughout the area. A variation of more than $2\frac{1}{2}$ per cent. in any one of these measurements below the specified thickness will cause the plate to be rejected. All wood entering into the construction of houses and fittings shall be of the best quality, live, sound and free from any defects that would render it unserviceable for the purpose intended. All wood to be thoroughly seasoned. Forgings shall be subjected to the same tests prescribed for forgings under propelling machinery (Par. 114). Tensile strength 60,000 pounds per square inch. In all cases where weights of steel is stated in pounds, it shall mean per lineal foot for angles and shapes, and per square foot for plates.

19. *Frames*.—The frames shall be of bulb angle 8 inches by $3\frac{1}{2}$ inches, 23.9 pounds from frame 28 to frame 121 and 19.1 pounds at ends. They shall be spaced 24 inches from center to center except at gate openings and shall be in one piece from midship line to main deck. The spacing at gate openings shall be 30 inches as shown. These frames shall be properly beveled to give a good connection to shell plating. At the upper end where frames connect to brackets and deck beams all rivet holes may be punched in either beam or frame and one hole in the other member for connection. The remaining holes in this member shall be drilled in place after erection.

20. *Reverse Frames*.—There shall be an angle bar $3\frac{1}{2}$ inches by 4 inches by 11.9 pounds on every floor plate. From frame 55 to frame 94 these shall be double.

21. *Floor Plates*.—These shall be 27 inches and 36 inches deep at center line. Those under engine and boiler rooms shall be 25 pounds, the remainder from frame 28 to frame 121 $22\frac{1}{2}$ pounds and the end ones 18 pounds.

22. *Vertical Keel*.—This shall be continuous, 57 inches wide and 25 pounds. It shall be secured to each floor by double angle clips $3\frac{1}{2}$ inches by $3\frac{1}{2}$ inches by 11.1 pounds. There shall be a continuous floor stringer on each side of this plate 20 inches wide by 25 pounds between points 5 feet forward of forward bin and the same distance aft of after bin. At the ends this plate shall be 20 pounds. On each side of this vertical keel plate there shall be three 6-inch by 4-inch by 20-pound angles, one at the lower edge for attaching to the flat keel, one at the top and one between these for attaching to the floor stringer. On the upper angles put a stringer plate about 13 inches wide by 25 pounds to points past the bins and 20 pounds at ends.

23. *Side Keelson*.—This shall be intercostal and shall consist of 25-pound plates, flanged on the bottom edge,

extending above the floors 6 inches. It shall be secured to the floors by angle clips $3\frac{1}{2}$ inches by $3\frac{1}{2}$ inches by 11.1 pounds. Riveted to the tops of these plates and the reverse frames there shall be two angles 6 inches by 4 inches by 20 pounds. Where reverse frames are single a $3\frac{1}{2}$ -inch by $3\frac{1}{2}$ -inch angle clip 11.1 pounds, 12 inches long, shall be riveted to top of floors.

24. *Bilge Keelson*.—This shall consist of two 6-inch by 4-inch by 20-pound angles riveted to the reverse frames. Where reverse frames are single a $3\frac{1}{2}$ -inch by $3\frac{1}{2}$ -inch angle clip, 11.1 pounds, 12 inches long, shall be riveted to top of floors.

25. *Upper Bilge Stringer*.—This shall consist of a 25-pound plate, the width of the web frames, 27 inches, with two 4-inch by 6-inch by 20-pound angles. The outer edges of the plates shall be connected to the shell plating by angle clips $3\frac{1}{2}$ inches by $3\frac{1}{2}$ inches by 11.1 pounds. Clips 12 inches long of the same size angle shall be riveted to the back of the bulb angle frame to rivet the inner angle to. The stringer plate shall be intercostal between web frames, and at these frames shall have riveted on clips of $3\frac{1}{2}$ -inch by $3\frac{1}{2}$ -inch by 11.1-pound angle. Connection between stringer and web frames shall be made by means of diamond plates about 24 inches square by 20 pounds, and double angle clips $3\frac{1}{2}$ inches by $3\frac{1}{2}$ inches by 11.1 pounds at each end. The ends of all stringers, where practicable, shall terminate in tie plates and breast hooks. All keelsons and stringers may be reduced at ends in accordance with the rules of the American Bureau of Shipping.

26. *Side Stringers*.—These shall be in all respects similar to the upper bilge stringer except that the lower side stringer has four and the upper three longitudinal angles 4 inches by 6 inches by 20 pounds. Clips, diamond plates, etc., shall be as specified in the preceding paragraph.

27. *Deck Beams.*—These for the main deck shall be of bulb angle 10 inches by 35.2 pounds on every frame from four frames forward of forward bin to four frames aft of after bin. The remaining frames at ends shall be 10-inch by 26.2-pound bulb angle. The midship beams shall have a crown of 6 inches in the span. Two lower deck beams each end of each bin shall be 10-inch by 35.2-pound bulb angle. The remaining lower deck beams, except at bulkheads where angles may be needed, shall be 10-inch by 26.2-pound bulb angle. Where angles are required at bulkheads they shall be of strength and stiffness equivalent to the bulb angle beams specified. The lower deck beams shall have no crown.

28. *Web Frames.*—These shall be located as shown, and shall consist of a 25-pound plate 27 inches wide reinforced on the inner edge by two angles of the same size as the reverse frames.

29. *Stem.*—This shall be in two pieces. The upper portion shall consist of a steel bar 10 inches by $2\frac{3}{4}$ inches scarfed to the lower casting. The lower part shall be a steel casting of the same size as the forged stem at top and scarfed to it. The lower portion shall be V-shaped to connect to plating and shall extend far enough aft to make a secure connection to the flat and vertical keels.

30. *Stern Post.*—This shall be a steel casting as shown extending at bottom far enough forward to make a secure connection to the flat and vertical keel. This post shall have cast on it lugs for rudder stops and pintle bearings, these latter being bushed with lignum vitae. The top of this post shall extend under and forward of transom floors, and shall be attached thereto by heavy angle clips.

31. *Stanchions.*—These shall be installed as required by the Rules of the American Bureau of Shipping. Additional stanchions shall be installed under the pumping platform and electric light plant and as may be required.

32. *Rudder*.—This shall be of steel of the single plate type, the plate being 1 inch thick, and the stock and pintles conforming to the requirements of the American Bureau of Shipping for a steamer whose second numeral is 40,000. The arms supporting the plate shall be forged. It shall be provided with pintle lugs to correspond with those on the stern post. A bearing shall be provided on lower deck to take the weight of the rudder. A loose, flat bronze ring shall be placed between the collar on rudder and bearing plate, riveted to deck. Means for oiling shall be provided. A suitable stuffing box shall be provided at the point where the rudder head passes through the stern plating. There shall also be a bearing at upper deck for rudder head. All rudder pintles shall be fitted with brass sleeves. Rudder stops shall be forged on. The contractors, if they so desire, may submit for consideration a cast steel rudder, of the size and shape shown, and equal in strength to that above described.

33. *Quadrant*.—This shall be of steel, forging, casting or combination, shall have double grooves for chain, and shall be fitted to rudder head with two keys and clamping bolts. This quadrant shall be placed above the deck as shown.

34. *Stern*.—This, from transom floor aft, shall be framed with angles 6 inches by 4 inches by 20 pounds.

35. *Flat Keel*.—This shall be of the flat plate type in two thicknesses from frame 24 to frame 121 inclusive. The inner course shall be 32 inches wide by 25 pounds, and the outer course 44 inches wide by 36 pounds to four feet beyond the end of the inner keel at each end. The remaining lengths at ends may be 25 pounds.

36. *Plating*.—This shall be of the weights shown on the midship section, the heavier weights running from frame 27 to frame 122 with lighter weights at ends. All outside

plates shall have doubling plates at bulkheads, and shall be reinforced at openings, the total strength at these places being at least equal to the original plate. Transverse or vertical joints below the light water line may be lapped, all other vertical joints shall be butted with single straps. All plating shall be worked "in and out" in longitudinal strakes. Longitudinal laps to be double riveted, and all vertical laps and butts to be treble riveted. The plating shall be double riveted to stem and stern posts. The inner strake of all plating shall be worked up close to the frames. No liners will be allowed except for the outside strakes, and in such places where they become a necessity from causes other than bad fit. All edges and butts shall be planed. All plates shall be thoroughly cleaned of dirt, rust, etc., before being fitted.

37. *Riveting*.—All rivet holes in hull plating shall be countersunk on the outside. After assembling all holes shall be reamed; the use of a drift pin to bring holes in line will not be allowed. Rivets must be so heated that they are of an equal temperature throughout. The size of the rivets shall be as specified by the rules of the American Bureau of Shipping. All outside rivets above the light water line shall be finished flush with plating; all rivets below this line and all rivets in bins shall be finished convex projecting about $\frac{1}{8}$ -inch beyond the plating.

38. *Staples*.—All staples for making watertight connection between beams, plates, etc., shall be forged from angles, well fitted to place and caulked.

39. *Deck Stringers*.—The main deck stringer plate shall be 60 inches wide by 25 pounds to 20 pounds at ends. It shall be butted, double riveted to straps and connected to sheer strake by an angle 6 inches by 6 inches by 24 pounds. Where scuppers occur the strength of the angle shall be maintained by reinforcing it. In the way of the coaling

hatches and at all corners of bins, the stringer shall be doubled. The lower deck stringer shall consist of a 25-pound plate in way of bins and a 20-pound plate between and fore and aft of these.

40. *Deck Plating*.—The deck plating shall be 14 lbs. to 12 lbs. at ends. Plating under windlass and capstan to be $\frac{1}{2}$ -inch thick. Plating on lower deck to be 12 pounds. All rivets shall be countersunk on the upper side. On the fore and after ends of both bins at the main deck put a transverse stringer about 28 inches wide by 20 pounds, and at lower deck as shown. All decks under wood floors shall have a coat of pitch with cement on top.

41. *Bulkheads*.—There shall be a watertight bulkhead on frames Nos. 12, 46 and 131. These shall extend only to lower deck. There shall also be a water tight bulkhead on frame No. 76, separating the boiler from the engine room. This shall extend to main deck. Plates of bulkheads to be 16 to 12 pounds and stiffeners of bulb angle 6 inches by 3 inches by $13\frac{3}{4}$ pounds vertical on one side spaced 24 inches centre to centre and horizontal on the other, spaced 48 inches centre to centre. Attachment of ends of stiffeners and all other details to be as required by the Rules of the American Bureau of Shipping. Put a watertight door in bulkheads 76 and 46 to be operated from either side. The spaces forward of bulkhead 12 and aft of bulkhead 131 will be used as water tanks, and both bulkheads shall be stiffened and tested by filling the spaces with water before launching, to the level of the lower deck, under an additional head of 6 feet. The other two bulkheads to be tested by a stream from a fire hose. Sluice valves to be placed in all bulkheads. Where keelsons or other members pass through bulkheads, collars shall be fitted around same, riveted and caulked watertight.

42. *Scuppers*.—Twelve scuppers 6 inches diameter shall

be placed on main deck where directed. The two central ones will not be located until after the vessel is launched and the trim determined. These shall all be provided with removable composition gratings, and the discharge be carried by pipes to points below the sheer strake, where it shall be discharged outboard.

43. *Bunkers.*—These shall be built on each side of the ship where shown and be adapted for carrying coal or oil, and the construction and riveting on the bunkers shall be "oil tight." The hatches on deck shall be provided with oil-tight covers, and also gratings for use with coal. Where shown on midship section put in an intercostal longitudinal the length of the bunkers, on each side, making oil-tight connections to plating, floors, etc. This is to form one side of a space for collecting any oil drippings, and this space will be connected to a special bilge pump. From the top of the bunkers carry a 6-inch vent pipe about 6 feet above the deck, put on a return bend and cover the opening with heavy galvanized wire net. Each of the three bunkers shall have a slat door into the boiler room and also removable oil-tight doors to close openings. The side of the bunkers in the boiler room shall be covered with 2 inches of 85 per cent. magnesia, properly secured and protected with a galvanized iron cover.

44. *Foundation for Engine and Thrust Bearings.*—The foundation for the main engine will be built up from and form a part of the framing of the vessel. The foundation for the thrust bearing will be similar to, and form a continuation of, the engine foundation. Both will be stiffened in a fore and aft direction by intercostals. The top of both foundations will be formed of $\frac{3}{4}$ -inch steel plates, secured together at joint by butt straps flush riveted.

45. *Limber Holes.*—Limber holes, 3 inches by 5 inches, properly located, shall be made in all floor plates and

frames, except those forming watertight bulkheads, and where directed.

46. *Bitts*.—There shall be 12 heavy cast-iron bitts, securely fastened with 1-inch bolts. Place wood pad under bitts.

47. *Chocks*.—There shall be 12 heavy cast-iron closed chocks and two heavy open roller chocks all securely fastened to foundation on deck and sheer strake.

48. *Hatches and Skylights*.—These shall be located where shown and the tops of all skylights shall be operated from the room below by suitable fixtures. The wood used shall be Michigan pine, and the glass, the best quality of skylight glass ribbed. Glass to have guards of $\frac{3}{8}$ -inch galvanized iron rods. Put in round hatches where shown, 18 inches diameter. On the main deck forward put a hatch with trunk for entering hold. This is to have a watertight cover.

49. *Eye Bolts, etc.*—All the necessary eye bolts, ring bolts, etc., for handling pipes, chains, boats, coal, cargo, provisions, etc., shall be provided and fitted in place on the dredge. The location of these will be determined during the construction of the dredge. Put a 1-inch eye bolt aft and forward of forward hatch.

50. *Hawser Pipes*.—There shall be two cast-iron hawser pipes, to take stockless anchors, fitted in place.

51. *Chain Lockers*.—There shall be two chainlockers in the fore peak, to be built of angles, 5 inches by 3 inches, 12.8 pounds, spaced 24 inches center to center, and covered with plate $\frac{1}{2}$ -inch thick, riveted to angles. Attach two heavy rings in each locker for securing chain.

52. *Companion Ways*.—There shall be one companion way, constructed of angles, 3 inches by 3 inches, 7.2 pounds, and $\frac{1}{4}$ -inch steel. Doors with lock and proper attachments to be placed as directed.

53. *Hose Racks*.—There shall be four hose racks, built of oak and placed where directed, each being of such size that it will hold a coil of 50 feet of 2½-inch double-jacket fire hose.

54. *Ladders*.—Steel pipe and wood ladders shall be placed where shown and necessary. All fittings for holding ladders in place shall be furnished. Furnish rope and Jacobs ladders.

55. *Ventilators*.—There shall be one 20-inch ventilator between frames 3 and 4; two 36-inch vents on frame 66 to boiler room; four 20-inch vents over main engine room and four 20-inch vents on after house. The cowls to all these shall turn easily and those in the engine and boiler rooms shall be operated from these rooms. The ventilators leading to the fire room shall be provided with ash hoist gear lined with angle iron and have doors at main deck. All cowls and exposed parts of these ventilators shall be made of heavy galvanized iron. There shall also be placed four 12-inch mushroom ventilators over rooms of after house and three on pilot house. These shall be opened and closed from within the rooms. All parts of the mushroom ventilators within the quarters aft, of brass. Put 6-inch goose neck ventilators where shown, and make them 2 feet above the deck at crown. Put in two ventilators for lower toilets aft—as shown. The two exhaust ventilators on main deck forward shall be supplied with electric exhaust fans, 24 inches diameter, General Electric Company make, or equal.

56. *Railing*.—There shall be a polished machinery steel railing, 1¼ inches in diameter, around the propelling and pumping engines. The railing will be secured to 1½-inch diameter steel stanchions spaced 3 feet apart. In the pilot house there shall be a brass railing 1¼ inches in diameter, around front of pilot house, also across the par-

tition between the pilot house and captain's room. On the outside of pilot house, at the doors, there shall be two (one at each outside door) grab rails of brass $1\frac{1}{4}$ inches in diameter, and two feet long. The railing in the pilot house, and the grab rails outside of the pilot house doors, shall be fastened to brass stanchions about 6 inches long; stanchions to be secured to woodwork by brass screws. Put grab rail each side of door to passage.

57. *Winch*.—Place on foundation over after bin a steam winch, Lidgerwood or equal. This shall have double 8-inch by 10-inch cylinders, non-reversible, and shall have two large gipsy heads, operated independently of each other, with positive clutches and friction bands. Furnish canvas cover for winch. Steam shall be reduced to about 90 pounds for this.

58. *Windlass*.—There shall be one No. 8 Hyde Combination Steam and Hand windlass, Lidgerwood or other equally good, with reverse lever. Cylinders 10 inches by 10 inches, or of equivalent dimensions. Wild cats for $1\frac{7}{8}$ -inch stud link chain, regulation size, winch ends medium size. A canvas cover shall be furnished for windlass. Steam pipe to this to be supplied with a suitable reducing valve to give a pressure of about 90 pounds per square inch. Set on pine pad.

59. *Steam Capstan*.—There shall be one No. 3 Hyde Steam Capstan, Lidgerwood or other equally good, with double cylinders, 7 inches by 8 inches, or equivalent dimensions. The throttle for operating capstan to be on deck. Put reducing valve on steam pipe as specified under windlass.

60. *Flag Poles*.—There shall be two pine flag poles; one forward 15 feet long, 5 inches in diameter; one aft, 18 feet long, 5 inches in diameter, both to have gilt ball, 4 inches in diameter, with sheave for flag halyards.

61. *Main Railing.*—The main railing shall be as shown, having 1½-inch diameter, wrought-iron stanchions, 3 feet high, riveted to sheer strake. There shall be three rows of galvanized-iron pipe through these stanchions. There shall be two gangways for coaling and two gangways for ladders. The top rail shall be of 1½-inch pipe, the other two of 1-inch.

62. *Side Lights.*—There shall be 60 side lights, 12 inches in diameter, clear opening, with composition frames, and provided with rubber gaskets, eye bolts, and hooks. They shall be made water tight. Eight lights at stem to be fitted with guards. Each light to be secured by three bolts with wing nuts—composition.

63. *Mast.*—There shall be one mast of Oregon pine, 20 inches in diameter at the deck, 14 inches at the hounds, and 6 inches at the head. It shall be 54 feet from main deck to mast heads. It shall be fitted with all the necessary iron work and rig. Mast head to have gilt ball 8 inches in diameter, with two sheaves for signal halyards. Two derricks shall be fitted of Oregon pine, 10 and 6 inches in diameter and 28 and 16 feet long, to be fitted with lifts, double blocks, with double falls, guys, etc. All ropes for falls and guys to be fitted and furnished by the contractor. Chain plates shall be riveted to sheer strakes. All iron work of masts and derricks shall be galvanized.

64. *Derrick Masts.*—There shall be two derrick masts placed as shown. These shall be 20 inches diameter at the deck, 14 inches at the top and 40 feet high above the deck. To each of these masts there shall be attached one boom 40 feet long and 14 inches diameter. These masts shall be well tied together and to the vessel, all iron work extra heavy and galvanized, and all designed for lifting 8,000 lbs. with one boom at a radius of 30 feet from the center of the mast. Furnish the necessary blocks and steel

wire rope falls for handling. Leads for hoisting and raising boom to be taken to winch over after bin.

65. *Water Tanks*.—From frame No. 76 to frame No. 93, shall be made water tight, as shown on section. Lightening holes, 14 inches by 20 inches, shall be cut in floor plates from frame No. 77 to frame No. 92, to allow for cleaning, painting and for circulation of water. The center keelson shall have two 3-inch holes drilled in it between each floor space from frame No. 77 to frame No. 92. Two tanks, 1,500 gallons capacity each, with filling pipe, splash plates, man hole, drain pipe, and vent. Tanks to connect to pump in galley and as specified. Tanks to be placed aft of after bin and cemented inside, and to have three coats of paint outside. Two filling plugs for tanks placed where directed on deck. Engine room tank to have valve for draining into bilge.

66. *Steam Steering Engine*.—There shall be one Williamson or equal steam and hand steering engine, cylinders 6 inches by 8 inches, diameter of wheel 5 feet, brass column and shaft in pilot house, with bell attachment. The engine shall be fitted with adjustable thrust bearing and double worm. It shall be provided with a Leslie, or equal, reducing valve.

67. *Rigging*.—There shall be six shrouds to mast, three on each side and one fore stay. The shrouds and stays shall be of $\frac{7}{8}$ -inch galvanized steel wire rope served their entire length. They shall be set up to chain plates with $1\frac{1}{2}$ -inch galvanized-iron turnbuckles. The shrouds shall have iron ratlines.

68. *Name*.—The name shall be on the stern in 10-inch cast brass letters. All lettering to be polished.

69. *Draft Figures*.—Draft figures shall be cut each side on stem and stern post and amidship for indicating draft of water.

70. *Guard Sponson.*—There shall be two long and two short guard sponsons built of angle bars 6 inches by 4 inches by 16.2 lbs., and 2-inch wrought-iron braces as per drawing. There shall be 4 oak guards, 8 inches by 10 inches, fastened to a 10-inch by 3½-inch channel, channel to be riveted to shell plating, at forward end. The guards shall be covered on the outside with 4-inch by ½-inch wrought-iron, fastened with ½-inch by 5-inch round spikes, heads of spikes to be countersunk. Two of these guards shall connect to the two long sponsons.

71. *Waste Lockers.*—There shall be two waste lockers, placed where directed, built of ⅛-inch steel, fitted with locks. Each shall have a capacity of 250 pounds of waste.

72. *Bins.*—There shall be two sand bins, built as shown on the drawings. The top of the forward bin shall start on frame No. 30 and extend to frame No. 55. The top of the after bin shall start on frame No. 94 and extend to frame No. 119. The bin studs shall be of bulb angle 6 inches by 3 inches by 13.8 pounds, spaced 24 inches center to center. The sides of the bins shall be braced as shown. On the top of the floors on each side of the gate openings, there shall be a 20-pound stringer plate extending at least one frame space fore and aft of bins. Stiffening at lower deck shall be as shown. Studs on ends of bins shall be connected at top and bottom as shown; and be supported between these points by two transverse girders. These shall connect to side stringers as shown. Bins shall be thoroughly caulked.

73. *Hips in Bins.*—The hips shall extend fore and aft and across the bottom of bins as per plan. The studs of hips shall be angle bars 4 inches by 3 inches, 11.1 pounds; they shall connect at the top by a 17½-pound gusset plate. At the bottom there shall be two 17½-pound gusset plates riveted to studs, one on each stud. At the bottom the gus-

set plate shall rivet to the floor plate stringers. The framing and plating for the central transverse hip shall extend from side to side of bin for strength. The longitudinal hip shall member to this and the bin ends, and the fore and aft transverse hips of each bin shall member to the longitudinal hip and the bin sides. There shall be 8 gate openings in each bin. Where the frames and floor plates are cut for gate openings the $\frac{5}{8}$ -inch intercostal plate shall rivet to floor plates with angle clips $3\frac{1}{2}$ inches by $3\frac{1}{2}$ inches, 11.1 pounds, and also rivet to stringer plate and shell plating with $3\frac{1}{2}$ -inch by $3\frac{1}{2}$ -inch, 11.1 pound angle clips. At each side of the gate openings there shall be a 20-pound plate, long enough to reach between the stringer plate running fore and aft each side of the gate openings. This shall be riveted to angle bars on floor plates. Interior of all gate openings to be lined with plates $\frac{5}{8}$ -inch thick, with angles in corners and staple angles on lower edge.

74. *Casting for Gate Frames.*—There shall be 16 steel castings for gate frames, as per plan. The casting shall be made in accordance with the detail drawing. Each casting shall be riveted to stringer plates. The surface of contact between gate frames and gates shall be faced. Lugs for gate hinges shall be cast on one side. The patterns for the gate frames, as well as for the gates, shall become the property of the United States.

75. *Gates.*—There shall be 16 cast-steel gates as per drawing. Lugs shall be cast on each gate for hinges. There shall also be cast near the center of each gate a lug to connect to the rod used to close and open the gates. On all wearing edges of gates rivet a steel bar as shown, making close joints at corners.

76. *Bin Plating.*—The plating in the bins shall be as shown on section. The top of hips shall be covered with

a 4-inch by 4-inch by $\frac{1}{2}$ -inch angle, riveted to hip plating. There shall be at each corner of each bin a 4-inch by 4-inch by $\frac{1}{2}$ -inch angle riveted to bin plating.

77. *Riveting in Bins and Hips.*—All rivets entering into the construction of the bins shall be of $\frac{3}{4}$ -inch diameter, with countersunk heads in bins, convex.

78. *Foundation for Sand Pumps.*—The foundation for sand pumps shall be constructed as shown on plate No. 2. Under the center of each crank of the pumping engine there shall be a solid wrought-iron stanchion, 3 inches in diameter, riveted to beam and floor plates. The beams shall be covered with a $\frac{1}{2}$ -inch plate, riveted to beams, and to bulkhead by angle bar 4 inches by 3 inches, 11.1 pounds. Put in other stanchions as may be required.

79. *Gate Mechanism.*—The gate mechanism for opening and closing the gates shall consist of two plates connecting to lug on gates, and to a wrought iron rod 3 inches in diameter. The exact length of the plates and rods will be determined during the construction of the ship. A guide shall be placed over the center of each gate opening. The guide shall consist of steel casting with cap holding the 5-inch pipe encasing rod firmly. The 3-inch diameter rod shall have at the top a $\frac{1}{2}$ -inch square faced thread 1-inch pitch. This shall pass through a large cast iron nut, which nut shall form the hub of an operating wheel made of $1\frac{1}{4}$ -inch and $\frac{3}{4}$ -inch gas pipe. The casting in which this nut revolves shall be of cast iron, and be in halves bolted to a $\frac{3}{4}$ -inch plate. There shall be girders, as shown on the drawing, riveted to deck beams and coaming by angle bars 4 inches by 3 inches by 11.1 pounds. On the hub there shall be mounted a worm wheel, engaging a worm on a side shaft as shown. This shaft shall be operated by a reversible engine with double 8-inch by 8-inch cylinders. There shall be one engine for each bin arranged to operate all the gates or those on either side.

80. *Overflows.*—These shall be constructed as per drawing. They shall be built of $\frac{3}{8}$ -inch steel, and shall be connected to bin and shell plating by angle bars 4 inches by 3 inches, 11.1 pounds. The connections shall be made water tight. The hull plating at the overflows shall be reinforced by a plate at least 4 feet by 4 feet, 22 pounds.

81. *Gates for Overflows.*—There shall be eight gates provided for lower overflows. These gates shall be held in position by two plates forming a groove. The operating mechanism of these gates shall be similar to that of the sand bin gates, except no steam gear, and shall be made as shown by the drawing.

82. *Coaming Around Bins.*—There shall be a coaming around the bins, consisting of a $\frac{3}{8}$ -inch plate, about 30 inches high, riveted to main deck stringer plate on sides and to steel deck across ends by 4-inch by 3-inch, 11.1 pound angle. The top of coaming shall be finished with a 3-inch angle. Sheath house at forward end of after bin with 5-pound plate to under side of windows, and make watertight.

83. *Cementing.*—The entire inside bottom of the dredge to the top of the floors, the inside of the engine room tank, fore and after peak tanks and surfaces of the chain lockers shall have a coating of Bitumastic solution and a coat of Bitumastic enamel, or other preparation of equal value approved by the Engineer.

84. *Painting.*—All surfaces of steel inside of the vessel, not cemented, and outside of the hull above the light water-line shall receive four coats of paint, the last coat tinted as directed; this coat shall be put on after the trial of the dredge (See Par. 234). Red lead for the first two coats, white for the last two. All houses, masts, ventilators, derricks, windlass, capstan, rails, skylights and canvas covers on top of houses, shall receive three coats of lead,

tinted as directed. Inside of houses shall be finished with one coat of shellac, and two coats best spar composition. Ceilings in all rooms to be finished in white, three coats. In the quarters on lower deck, the sides and deck overhead shall be covered with granulated cork. This shall receive three coats of white lead. Draft figures to be colored as directed.

85. *Below Water Painting.*—All the exposed surface of the vessel and appurtenances below the light water shall receive four coats of red lead paint. The last being put on after the hull is dry and in dry dock. Each coat shall dry 24 hours before the next is applied on the vessel put in water.

86. *Pilot House, Captain's and Inspector's Rooms.*—These shall be built as per plan. Sills shall be of pine, 4 inches by 5 inches; studs, spruce, 3 inches by 4 inches; carlins, pine, 3 inches by 4 inches; plate, pine, 4 inches by 6 inches. Outside sheathing to be of Michigan pine, 3 inches wide $\frac{7}{8}$ -inch thick; to run fore and aft below belt rail, above belt rail up and down, decking 3 inches wide $\frac{7}{8}$ -inch thick Michigan pine; water batten 2 inches by 5 inches of pine; drip plate of pine, $1\frac{3}{4}$ inches by 6 inches. Inside sheathing of oak, $1\frac{1}{2}$ inches by $\frac{7}{8}$ -inch. Floors to be of oak. Inside sheathing, outside sheathing, decking and floors to be T and G. There shall be at least ten holding-down bolts, $\frac{3}{4}$ -inch. Overhang of this house to be 18 inches. Floor of pilot house to be covered with a removable oak grating. All nails and bolts in pilot house to be of brass.

87. *Upper Boiler Room.*—The upper boiler room shall be built as per plan. Sills shall be of Georgia pine, 6 inches by 9 inches; studs of spruce, 4 inches by 5 inches; carlins of Oregon pine, 3 inches by 5 inches; plate of pine, 4 inches by 6 inches; decking, Michigan pine, 3 inches by

$\frac{7}{8}$ -inch; water batten 2 inches by 6 inches pine, drip plate, $1\frac{3}{4}$ inches by 6 inches, pine. Inside sheathing to be of cypress or Oregon pine, 3 inches wide, $\frac{7}{8}$ -inch thick. Outside sheathing to be of Michigan pine, 3 inches wide by $\frac{7}{8}$ -inch thick. Decking, inside and outside sheathing shall be T. and G. Boiler room to be covered at deck with wrought-iron grating. Vise bench, store rooms, shelves and lockers to be placed as shown. $\frac{3}{4}$ -inch holding-down bolts in this house to be placed where directed.

88. Bolt Shelf and Lockers.—The bolt shelf shall be placed where shown. It shall be of pine 6 feet long, and shall extend from top of house to within 36 inches of floor. It shall be 12 inches deep and fastened to battens. The shelf shall be divided into one-foot square places, to hold the different size bolts. Each division shall be $\frac{3}{4}$ -inch thick and 1 foot long. There shall be one locker, built, fitted with doors, having locks. This shall be built of cypress or pine, and extend from top of house to deck, and shall be 6 feet wide and 12 inches deep. The locker shall have 5 shelves of $\frac{3}{4}$ -inch cypress. Across the front of the shelves there shall be a batten to prevent tools from falling out.

89. *After House*.—This shall be built as per plan. The sills shall be of Georgia pine, 6 inches by 9 inches; studs, spruce, 4 inches by 5 inches; plate, pine, 4 inches by 6 inches; carlins, pine, 3 inches by 5 inches; decking, Michigan pine, 3 inches by $\frac{7}{8}$ -inch thick; water batten, pine, 2 inches by 6 inches; drip plate, $1\frac{3}{4}$ inches by 6 inches; outside sheathing, Michigan pine, 3 inches wide, $\frac{7}{8}$ -inch thick; inside sheathing, oak, $1\frac{1}{2}$ inches wide, $\frac{7}{8}$ -inch thick. All inside and outside sheathing of houses to have chamfer. Decking, inside and outside sheathing, also floors, shall be T and G. Carlins in this house to extend to main rail, and shall be supported by iron stanchions, $1\frac{1}{2}$ inches diam-

eter, from rail to carlins, placed where directed. There shall be $\frac{3}{4}$ -inch diameter holding-down bolts, as required.

90. *Galley*.—A dumb waiter, about 18 inches by 24 inches, shall be built in the galley; also all the necessary shelves, racks and dressers shall be placed in the galley and store rooms, all as hereinafter described. One porcelain-lined sink, 18 inches by 24 inches, by 10 inches deep, with pump connecting to fresh water tank, shall be placed in the galley. This sink shall not be enclosed. The bulkhead back of the sink shall be covered with sheet copper from the deck to a point 2 feet above the sink, and 1 foot longer than the sink and drip board. Put in brass steam pipe for heating the water, noiseless discharge end. Dumb waiter to be hung on braided sash cord, over brass pulleys to counterweight. Put in Born or equal 8 hole range, complete with coal hod, tools, etc., for burning soft coal.

91. *Dish Racks*.—In the galley there shall be a dish rack located as directed. It shall be constructed of oak. There shall be 15 divisions in it of dimensions to accommodate the different size plates, platters, saucers, cups, mugs, vegetable dishes, etc. The sides and bottom of the rack shall be $\frac{7}{8}$ -inch thick, the shelves and partitions, $\frac{5}{8}$ -inch thick. There shall be a neat moulding of oak around all the openings for dishes.

92. *State Rooms*.—All state rooms shall be provided with one or two berths, as per plan, with 4 drawers under lower berths, one enameled washstand, not inclosed, with basin, 12 inches in diameter. Drips from basins in state room, bath room, and from sink in galley, also scuppers in toilet rooms, shall run overboard each side of ship. All lockers in state rooms shall have one shelf with 6 heavy brass hooks. All keys to doors shall have brass tags.

93. *Doors*.—All outside doors shall be of Michigan pine $1\frac{3}{4}$ inches thick, with four raised panels. Outside doors

shall have 3 heavy brass strap hinges each, 1 heavy brass lock, drop handle outside, knobs inside. Inside doors shall be of the same material as the finish in the room, and shall have raised panels. All inside doors shall have brass butts and brass locks of an approved pattern. All doors shall be fitted with brass buttons, catches and hooks where necessary. All drawers and locker doors shall have brass locks. Drawer pulls shall be of polished brass. Screen doors, copper wire, same finish as room, shall be placed in all state rooms, galley and mess rooms. These doors shall be provided with spring hinges, buttons, catches and hooks, all of brass. Door sills shall be covered with sheet brass. Fire room door sills shall be covered with No. 18 galvanized iron, also jamb of doors 3 feet high. Doors to have rubber-tipped stops.

94. *Windows.*—Windows in pilot house shall have sash of hard wood, finest quality of double-thick glass, fitted with weights and pulleys. All other windows shall be of same finish as room, glass finest quality double thick, 18 inches by 24 inches. Windows to drop into pockets. All windows shall be fitted with catches and lifts of brass. Screen windows shall be furnished for all state rooms and mess rooms and galley; sash, Michigan pine; screen, copper wire 18 mesh. Windows to be fitted with buttons and catches of brass.

95. *Blinds.*—All state rooms, mess rooms, galley and officers' bath room, shall be furnished with inside blinds, of same finish as room. They shall slide up and down, and shall be fitted with buttons and catches of brass.

96. *Cushions.*—Red corduroy cushions of durable, first-class, approved quality shall be furnished for seats in pilot house.

97. *Covering.*—All houses shall be covered with No. 3 cotton duck canvas, fastened with $\frac{3}{4}$ -inch copper tacks; canvas to have 3 coats of paint, and be laid in paint.

98. *Scuppers.*—The after house shall have six 1½-inch scuppers leading from top of house to deck. The midship house shall have sixteen 1½-inch scuppers leading from top of house to deck. The pilot house shall have two 1½-inch scuppers leading from top of house to top of captain's room. House after pilot house shall have two 1½-inch scuppers leading from top of house to top of house below. The upper part of scupper to be of lead, and be continued to the deck by galvanized-iron pipe same size. There shall be eight scuppers on the bridges with pipe leading to deck.

99. *Bridges.*—There shall be four bridges built as shown, supported by forged stanchions.

100. *Railing around Houses.*—There shall be a galvanized-iron rail around amidship and after houses and bridges. The stanchions of wrought iron 3 feet high, spaced about 4-foot centers, with 3 rows of galvanized-iron pipe running through them. They shall be fastened to water batten with four lag screws in each foot.

101. *Heaters.*—All sleeping rooms, mess rooms, toilets and bath rooms, shall have approved iron heaters. The pilot house shall have a brass heater. Drips from all heaters to run into trap, trap to overflow into filter box. All iron heaters to be covered with aluminum paint.

102. *Tables.*—All tables in the mess room shall be of oak, they shall be secured to the deck and the tops have a batten around outer edges.

103. *Firemen's and Sailors' Quarters.*—These shall be located aft on the lower deck as shown and shall be reached by a companion way entrance in after house. Floors for toilet and bath rooms raised as shown. The berths to be two in height, have pipe standees and rails, wire bottoms and all finished in white enamel.

104. *Petty Officers' Quarters.*—These shall be arranged

on the lower deck forward as shown. Berth shall be similar to those specified, for the firemen and sailors with lockers as indicated. Basins to be about 12 inches diameter, enameled iron, to drain outboard. Bath tub to be 4 feet 6 inches long, roll rim, enameled iron. Water closets to be cast-iron hopper, enameled inside, with oak rim attached. The closets, bath tub and basins shall have independent discharges through the ship side. On the discharges from the tubs and closets put quick opening gate valves inside the hull, operated by suitable and easily accessible levers. On the discharge of each basin above the deck put a gate valve. All to be so arranged that if desired the ingress of water from the outside can be prevented. The discharge from the basins to unite below deck into one discharge pipe.

105. *Sailors' and Firemen's Toilets.*—These shall have closets as above specified. The bath room shall have an overhead spray, and the walls of the bath room shall be lined with copper. The closets and bath shall discharge overboard, and on each discharge there shall be placed, inside the hull, a quick opening gate valve operated by an easily accessible lever. All toilets and bath rooms shall have a scupper in the floor with gate valve and pipe leading outboard—for washing out.

106. *Officers' Bath and Toilet.*—The toilet shall be of earthen ware, J. L. Mott, Pl. 709 Y or equal, with double oak seat, with water connection for flushing; bath tub, 5 feet long, roll rim enameled; both to discharge overboard below the sheer strake. Both the officers and petty officers' bath to be supplied with cold water and a steam water heater.

107. *Hardware.*—All hardware shall be extra heavy, of brass polished and shall be approved before putting up; doors shall have rim locks with knobs inside and drop

handle outside, hook to hold door open, and heavy strap hinges. Panels of screen doors shall be fitted with bronze wire cloth 18-mesh. These doors shall be fitted with spring hinges, catches and hooks, screen windows to be held in place by brass buttons. Sash to have brass lifts, and inside blinds to have lifts and catches working on a cast-brass rack on frame holding blind at any height. All drawers to desks shall have brass locks, flat keys.

108. *Chafing Plates*.—At joints of the suction pipe where shown, put $\frac{5}{8}$ -inch chafing plates, 24 inches wide, located so as to protect the hull from wear. Build guard of channel to keep drag from side of ship.

109. *Dry Docking*.—After the preliminary trials and just before completion, the dredge shall be placed in dry dock, when, after cleaning, the last coat of paint above the light water line and one coat below this line shall be put on.

110. *Refrigerating Room*.—This room shall be built as shown. The insulation on all sides, top and bottom, shall be made as shown. In one portion of this room there shall be constructed an ice box capable of holding 800 pounds of ice. The door to this box to open into entry. In the refrigerating room put up 6 heavy meat rods with two hooks on rollers on each, and shelves as directed. In this room also put two 20-gallon tanks of sheet zinc with covers. These are to hold drinking water. A pipe from one of these tanks shall lead to the officers' mess room and terminate in a faucet. A pipe from the other shall lead to the petty officers mess room and terminate in a faucet. These pipes, where they are outside of the refrigerating room, shall be thoroughly insulated.

PROPELLING MACHINERY.

TESTS OF MATERIALS.

111. *Test for Cast-iron.*—From each heat of cast iron a tensile piece shall be cast in the presence of the inspector. A test coupon will be attached to each of the larger castings. The test pieces for cylinders, valve chest linings, packing rings and main guides shall show a tensile strength of at least 25,000 pounds per square inch. All other castings will show a tensile strength of 20,000 pounds per square inch.

112. *Test for Cast-steel.*—One test coupon will be required from all steel castings. The tensile strength of all castings shall be at least 60,000 pounds per square inch, with an elongation of at least 24 per cent in 2 inches for all castings for moving parts of the machinery, and 20 per cent in 2 inches for other castings. The sectional area of test specimens shall be at least $\frac{1}{2}$ -inch. The elastic limit shall be one-half of the ultimate strength.

113. *Bending Tests for Cast-steel.*—From each large steel casting or from each heat of smaller castings, a bending bar, 1-inch square, shall bend cold without showing cracks or flaws, through an angle of 120 degrees for moving parts of machinery and 90 degrees for other castings, over an inside radius not greater than $1\frac{1}{2}$ inches.

114. *Tests for Shafting, Steel Columns and Reverse Shaft.*—These shall be made of open-hearth steel. A tensile test specimen shall be taken from each. They will have a length of 2 inches between measuring points, and a section area of at least $\frac{1}{2}$ -inch. Each of these test pieces shall show a tensile strength of 60,000 pounds per square inch and an elongation of 28 per cent in 2 inches, with elastic limit one-half the tensile strength.

115. *Quenching and Bending Tests for Shafting, Col-*

umns, etc.—A bar $\frac{1}{2}$ -inch thick and from $\frac{1}{2}$ to 1-inch in width will be taken from each forging and must stand bending double over an inside diameter of 1 inch after quenching in water at 82 degrees F. from a dark cherry red heat in daylight, without showing cracks or flaws.

116. *Tests for Piston, Connecting and Eccentric Rods, Valve Stems, Crossheads, and Main Links.*—These shall be of open-hearth steel. All test specimens shall be cut from the forging and shall have a length of two inches between measuring points. Each of these specimens shall show a tensile strength of 80,000 pounds per square inch and an elongation of 24 per cent in two inches. The sectional area of specimen shall be at least $\frac{1}{2}$ -inch. Elastic limit one-half the tensile strength.

117. *Bending Tests for Piston, Connecting and Eccentric Rods, Valve Stems, Crossheads, and Main Links.*—One bar $\frac{1}{2}$ -inch thick, cut from the upper end of each forging, must stand bending double when cold to an inner diameter of 1 inch without showing cracks or flaws.

118. *Miscellaneous Forgings.*—The connecting rod bolts, main bearing bolts, eccentric rod bolts and studs, and link and valve stem bolts, shall be subjected to the same tests as those specified for piston rods. Other miscellaneous steel forging for machinery shall be subjected to the same tests as those specified for shafting. Coupons shall be cut from the end of forgings, midway between center and outside. This applies to all forgings, shafting, rods, etc.

GENERAL DESCRIPTION.

119. There shall be two vertical, inverted, direct acting, open frame, surface condensing, fore and aft compound engines, with cylinders 22 inches and 46 inches in diameter, and a common stroke of 30 inches, driving four-bladed

cast-iron propellers 8 feet 6 inches in diameter, and 14 feet pitch. Engines to exhaust into condenser and also have atmospheric exhaust. Template to which the propellers are bored shall be furnished. Column and bed plate castings shall be smooth and free from surface defects.

120. *Cylinders*.—The high pressure will be 22 inches diameter, made of hard, close-grained cast-iron. All the necessary lugs and flanges are to be cast on for required attachments. The low pressure cylinder will be cast separate from the high pressure cylinder, and will be 46 inches in diameter. The internal parts of the cylinders and valve chests shall be pickled to remove scale and sand. The H. P. cylinders of main and pumping engines shall be tested by internal water pressure of 200 pounds per square inch, and the L. P. cylinders by a pressure of 100 pounds.

121. *Counter Bore*.—The counter bore of each cylinder will be $\frac{1}{4}$ -inch larger than the diameter of the cylinder, and of sufficient length, top and bottom.

122. *Clearance*.—There will be not less than $\frac{1}{4}$ -inch clearance from top of piston to bottom of cylinder cover, and not less than $\frac{5}{8}$ -inch clearance from bottom of piston to bottom of cylinder.

123. *Cylinder Relief Valves*.—On each high pressure cylinder shall be two adjustable spring relief valves $1\frac{1}{2}$ inches in diameter. On each low pressure cylinder there shall be two adjustable relief valves 3 inches in diameter. They shall be of composition, finished all over.

124. *Covering*.—Cylinders and valve chest to be covered with magnesia blocks and laged with the best quality of Russia iron, neatly finished with brass bands and round headed brass screws.

125. *Cylinder and Chest Covers*.—Covers to be made of proper depth, strongly ribbed and filled with magnesia. A cast-iron covering plate to be securely fastened to each

cover. Covers with turned grooves to be polished and free from all imperfections, eye bolts to be fitted for lifting.

126. *Balance Cylinder*.—The low pressure steam chest shall have a balance cylinder cast on cover with a bore of about 8 inches in diameter. Cylinder to be polished. All necessary brass piping from balance cylinder to condenser to be fitted in place.

127. *Stuffing Boxes*.—The stuffing boxes of each cylinder will be cast separate, and packed with approved metallic packing. The stuffing boxes are to be provided with composition bushings, and secured by a sufficient number of studs to make a steam tight joint. The glands shall be of composition.

128. *Piston Valve*.—The high pressure piston valves will be of cast iron, made with approved packing rings. The followers of the valves will be secured in place by steel stud bolts with wrought-iron nuts and brass split pins. The packing rings will be of hard cast-iron, turned and fitted in an approved manner.

129. *Low Pressure Slide Valve*.—The low pressure valve will be a double ported slide valve of the usual form, and will be made of cast iron. The face of the valve will be finished to a plane, all edges to be finished.

130. *Pistons*.—Pistons shall be of the best quality of cast-steel, for L. P. cast iron for H. P., conical. Packing rings to be of hard cast-iron set out by steel springs of approved pattern. The followers to be secured to pistons by shoulder studs of mild steel, with case hardened nuts, brass split pins to be used on every stud as a locking device. A suitable number of eye bolts to be furnished for lifting followers.

131. *Piston Rods*.—Piston rods to be made of forged steel, $4\frac{5}{8}$ inches in diameter. Each end will have a shoulder, and taper fit into piston and crosshead block, and will

be securely fastened by nuts about 4 inches deep, pins to be used as a locking device.

132. *Crosshead Blocks and Guides*.—Crosshead blocks to be made of forged steel, in one piece. The blocks to be about 8 inches square, finished all over. Crosshead will be made of cast steel and securely fitted to block by four through bolts. The ahead and backing sides to be filled with strips of Parson's white brass, or equal, not less than $7/16$ -inch thick. Area of contact to be such that pressure does not exceed 70 pounds per square inch.

133. *Crosshead Guide*.—There shall be a crosshead guide of cast iron fitted to each column of engines, and designed for water circulation.

134. *Connecting Rods*.—Connecting rods to be of forged steel, with fork at crosshead and a tee at crank pin end. There shall be furnished at each end a complete set of brasses, butt end to be fitted with Parson's white brass, or equal, and securely fitted with bolts. Bolts to be of forged steel. They shall be fitted with stops to prevent them from turning while being set up. The nuts for these bolts shall have a collar turned on them, and fit into recesses on rods, which will have set screws so arranged as to hold nuts in place when set. Rods to be finished all over.

135. *Valve Stems and Guides*.—Valve stems to be of forged steel, not less than $2\frac{1}{2}$ inches in diameter in body and $2\frac{3}{4}$ inches in guide, with tee heads forged on their lower ends and fitted complete with bolts and nuts of steel, for taking up wear on link block pin. Valve stem guides shall be of the yoke type, securely bolted to pads under each cylinder, and provided with suitable brasses and liners for taking up the transverse wear. All connections to be of marine type.

136. *Links and Link Blocks*.—The links will be of the Stevenson double bar type, about 4 inches wide and $1\frac{1}{4}$

inches thick, and made of forged steel. Link blocks to be of forged steel, with separate composition gib fitted on each side of each link. Links and blocks to be polished all over.

137. *Eccentric Rods, Sheaves and Straps.*—The eccentric rods will be made of forged steel, finished all over. The lower end will be secured to the strap, and will have a tee forged on to receive two steel stud bolts, which are to be tapped into strap. The upper end of the rods will be forked and have composition brasses, marine type, securely bolted as shown. Eccentric sheaves for high pressure engine shall be cast solid and bored out to fit shaft. The sheaves for low pressure engine will be cast in halves and securely bolted when in position. Eccentric straps will be lined with Parson's white brass, or equal. Sheaves to be made of best grade of cast iron; straps of cast-steel.

138. *Suspension Links, Reverse Shaft and Brackets.*—The suspension links shall be made of forged steel. Reverse shaft to be 4 inches in diameter, of forged steel, and polished all over. Brackets to be bolted on back columns for reverse shaft. Bearings for reverse shaft to be lined with Parson's white brass or equal.

139. *Back Columns.*—The back columns will be of cast iron. Necessary flanges and lugs will be attached for fitting cylinders and guides to same by a sufficient number of fitted bolts.

140. *Front Columns.*—The cylinders will be supported on one side by 3 forged steel columns, $4\frac{1}{2}$ inches in diameter, with heavy flanges on top and bottom. Columns to be polished and secured to cylinders and bed plate by fitted bolts.

141. *Bed Plates.*—These shall be made of cast-iron, each in one casting, with four main bearings, of tough composition, filled with Parson's white brass, or equal, and so

arranged that the lower half of the box can be rolled upward from under the shaft and removed when necessary. They are to be held in position fore and aft by suitable flanges. Bearing caps to be made of cast-steel, with opening in top for feeling and oiling journals. The main bearing bolts shall be of forged steel. All necessary eye bolts for removing parts shall be furnished. The engine bed-plate will be secured to the foundation by holding down bolts $1\frac{1}{8}$ inches in diameter body bound and spaced 10 to 12 inches between centers.

142. *Reverse Cylinders*.—A steam reversing engine, having a cylinder 9 inches in diameter by 14-inch stroke, with suitable flanges shall be securely bolted to engines. The working parts will be protected from shock by an approved cushion arrangement. Provide also a hand reversing gear. The steam cylinder shall have a valve, worked by a hand lever on a notched quadrant at the working platform, in conjunction with a floating lever. The arrangement will be such that the reversing piston shall follow the motion of the hand lever, and be firmly held when stopped. Fit drain pipes to the cylinders.

143. *Throttle*.—Throttle valves to be of the balance type, and will be fitted to steam chest with all of the necessary connections leading to the quadrant. The amount of opening will be regulated, or the valve firmly closed, by means of hand wheels and screws working in yokes on the valve bonnets.

144. *Turning Gear*.—Worm wheels for turning the shafts shall be provided with ratchet and lever of approved design.

145. *Telltals*.—Carry telltals from each engine to top of house to show revolutions.

146. *Starting and Reversing Gear*.—Suitable gear from throttle valve drain and reversing engine will be furnished.

Operating levers, quadrant, spring catches, and pull rods, shall be polished. Throttles of engines to be operated from top of house, as well as engine room. Engine room throttle to have locomotive latch.

147. *Drain Gear*.—Cylinder, chests and pumps will be provided with asbestos packed cocks, securely attached and led to condenser. All recesses in stop valves, fittings, castings, etc., shall be drained. Suitable drain levers and all attachments shall be furnished and located near starting and reversing levers.

148. *Clearance*.—After the engine is set up in place, adjusted and connected, the volume of clearance at each end of each cylinder shall be carefully measured, and the result plainly marked on some conspicuous part of the cylinders. Marks will also be made on the crosshead guides showing the positions of the pistons when the clearances were measured, and also showing the striking points. This applies to propelling and pumping engines.

149. *Indicator Gear*.—The cylinders will be furnished with the necessary rigging, piping, angle valves, three-way cocks, etc., and all required attachments for taking indicator cards.

150. *Crank Shaft*.—The crank shaft shall be forged in one piece, and made of the best quality of steel, $10\frac{1}{4}$ inches in diameter. The crank pins will be 10 inches in diameter by about 11 inches long. Couplings to be forged on shaft. Tapered bolts of proper size fitted to couplings. Crank shaft to be finished all over. Chamfer on crank webs to be turned on.

151. *Thrust Shaft*.—The thrust shaft to be of forged steel, finished all over, $10\frac{1}{4}$ inches in diameter, and provided with six thrust collars forged on. Coupling bolts will be the same as specified for crank shaft.

152. *Thrust Bearing*.—The thrust bearing will consist

of a cast-iron pedestal, which will be securely bolted to the main engine foundation plate by steel bolts in reamed holes. The forward end of this pedestal will be continued so as to bolt to lugs on main engine bed plate. The thrust will be taken by cast-steel horseshoe collars, lined with white metal and mounted on two Tobin bronze rods, upon which they will be kept from endwise motion by steel nuts screwed on the rods. The base of these bearings shall form a receptacle for oil and shall be cast with recess for water circulation, and connected to water piping. Put half stuffing boxes at each end to retain oil and galvanized covers over bearings.

153. *Intermediate Shaft*.—The intermediate shaft shall be of forged steel, finished all over, 10 inches in diameter, with flangs forged on, and coupling bolts as specified for crank shaft. Faces of couplings to be made male and female.

154. *Tail Shaft*.—The tail shaft shall be in one piece, finished all over, $10\frac{1}{4}$ inches in diameter, length to be taken from work. Coupling on this shaft to be of cast-iron. The after end of this shaft shall be 11 inches diameter.

155. *Spring Bearings*.—They will be of cast-iron with faced flanges secured to the foundation by forged steel bolts. The brasses shall be fitted so that they can be easily removed and renewed. The bearing surfaces shall be accurately bored, and faced with white metal strips, dovetailed, and hammered in place. The bearings will be supported on an approved and suitable foundation, built up of plates and angles from the floor plates.

156. *Stern Pipes for Shafts*.—The after floors through which stern pipe passes shall be properly bored to receive the stern pipe. The pipe shall be of cast iron turned at the bearings, and with faced joints pipe to be thoroughly fastened in place. At fore and after ends of these pipes

insert a composition sleeve lined with white metal. On the inside and end put double stuffing box.

157. *Shaft Struts*.—The shaft struts shall be placed where shown of cast-steel or a cast-steel hub with forged arms. These arms shall be egg-shaped in section. The shaft between the strut and stern tube shall be enclosed in a pipe made in halves. These halves shall fit closely together and to the castings at the ends and be made tight by gaskets.

158. *Oiling*.—At a convenient place in the after hold put two oil or grease cups for each stern tube. The cylinders of these cups to have a capacity of about 2 quarts. Carry a galvanized-iron pipe from the cups to the stern tube and bearing as shown. Put valves in these pipes just below the pumps. Carry a small air pipe from near the forward end of the stern tube to near the cups, and put a cock on the end. Where these pipes pass through the flats, the junction shall be made watertight. Cups to have screw and piston.

159. *Lubrication*.—To the high and low pressure cylinders there shall be fitted one brass multiple feed oiler, equal in every respect to the "Michigan." These oil reservoirs will have a capacity of not less than two quarts each, and will be provided with a filler at their tops. Pipes will lead from connections on reservoirs to all moving parts of the engine. Each steam chest will be fitted with an approved hand oil pump. Each main crank will be oiled by cups carried on the crosshead, taking oil from overhead. Each main crosshead journal will take oil from an overhead wick cup. Each crosshead guide will be oiled by dragglers taking oil from a cup at the bottom. Approved composition oil cups with screw tops will be fitted for oiling main links. The main bearings, thrust bearings, and spring bearings will each be provided with compres-

sion grease cups of an approved design and of $\frac{1}{2}$ -pint capacity. The main bearings will also have connections to the lubricators. There will be approved means of oiling pistons and valve stem rods. The eccentrics will also be provided with efficient means of oiling. All the working parts for which oil cups are not specified shall be provided with oiling gear of an approved design.

160. *Trolleys*.—Overhead trolleys shall be provided for main engines, pumping engines, sand pumps and condenser heads.

161. *Water Service*.—There shall be brass water service pipes for each engine, main guides, main bearings, thrust bearings, crank pins, spring bearings.

162. *Oil Drips*.—Oil drips of sheet brass shall be fitted where oil can accumulate, and to have drain cocks. Drip pans shall be placed under all pumping, propelling and auxiliary machinery where oil can accumulate or drip.

163. *Bypass*.—Fit bypass to low pressure cylinders taking steam from main steam pipe.

164. *Air Pump*.—One twin-cylinder, beam air pump, 12-inch diameter steam cylinder, 25-inch diameter air cylinder by 18-inch stroke, or of dimensions giving equal efficiency. Piston rods and buckets to be of composition. Air pump valves to be of brass. Pump to be Blake, Worthington, Davidson or other equally good. Pump to have head valves.

165. *Condenser*.—Surface condenser of approved type. Solid drawn brass tubes, tinned inside and out. Brass ferrules with shoulder. Tube sheets of brass. Heads, cast-iron; shell, steel; central supporting plate of brass. To have not less than 4,500 feet cooling surface. Discharge pipe of copper, with valve at ship's side. Cleaning doors top and bottom. Condenser shall be covered with magnesia and galvanized iron. Condenser shall be placed

higher than the air pump. Place on the condenser a soda cock and copper tank of 2-gallon capacity, and on the air pump suction pipe a 1-inch nozzle for boiling out. Connect the tube plates by 3 tie-rods in brass tubes. Put large perforated baffle plate over tubes. Before erecting in dredge, condenser shall be subjected to an internal hydrostatic test of 20 pounds per square inch.

166. *Circulating Pump*.—The circulating pump to be of centrifugal type with brass shaft and runners and operated by an independent engine. Pump discharge to be 10-inch and of sufficient capacity. To have suction to sea and bilge, with independent discharge overboard; suction to be of copper, with copper strainer, located well forward of bin overflows.

167. *Auxiliaries*.—The circulating pump, and electric light generators shall be capable of exhausting into the condenser, heater or atmosphere, all the other auxiliaries shall exhaust into either the atmosphere or heater. All auxiliary machinery shall be mounted on yellow pine pads 2 inches thick; pads to rest on the steel foundations.

168. *Ladders*.—These will be fitted wherever necessary or directed for reaching the engine or fire room from deck and for reaching the various platforms, passages, and parts of machinery.

169. *Boiler and Bilge Pumps*.—There shall be two vertical, duplex, brass lined pumps, of Blake, Worthington, Davidson, or other equally good type, 9 inches by 5½ inches by 10 inches, or of equivalent dimensions. To draw from filter, sea, bilge, or either water tank, and to discharge into boiler, overboard, or through hose at sides of houses, or into either tank. Pumps to be so connected that one can work in salt water while the other is working in fresh water.

170. *Heater*.—There shall be one multicoil, vertical,

feed water heater, 32 inches diameter, with proper connections. Coils to be of copper pipe. Heater shall be covered with magnesia and Russia iron. To be tested to 50 pounds per square inch, internal hydrostatic pressure.

171. *Service Pump*.—There shall be one brass lined duplex pump, steam cylinder $4\frac{1}{2}$ inches diameter, water cylinder $5\frac{1}{2}$ inches and stroke $4\frac{1}{2}$ inches or equivalent dimensions. This shall draw from the tanks or sea, and discharge into pipe leading to the various toilet fixtures.

172. *Pressure Pump*.—A pump similar to that above described shall be installed, drawing from the tanks or sea, and discharging into the water service to the engines and pumps.

173. *Filter*.—There shall be one filter about 10 feet long, 2 feet 6 inches square, with four partitions and cover.

174. *Syphons*.—Six $2\frac{1}{2}$ -inch syphons shall be furnished and fitted in place.

175. *Hand Pump*.—There shall be an approved hand pump, located in lower engine room where directed, fitted complete to draw from the sea, tanks, or bilge or boilers, and discharging into the auxiliary feed pipe or overboard, provided with all necessary pipes, valves, etc. It shall have a detachable hand lever, which shall be stowed in brackets at a convenient place. This is not to pump against boiler pressure.

176. *Injectors*.—Two Korting injectors, of ample size or other equally good, shall be furnished, with connection for hose for washing down.

177. *Centrifugal Bilge Pump*.—This shall have a cast-iron shell with brass pump shaft and runner, 4-inch suction and discharge pipe, and be connected to an engine of proper size. This pump shall discharge out board and shall have 8 suctions to bilge, each protected by a strainer, and

so placed that any portion of the hull can be drained. This suction pipe shall be independent of that for the other pumps. The pump shall have sufficient power to discharge the bilge water when the dredge is deep loaded.

178. *Fire Pump*.—One brass lined fire pump, 14 inches by 7 inches by 10 inches, or of equivalent dimensions; vertical, Blake, Worthington, Davidson, or any other equally good. This pump shall have a suction to the bilge; an independent valve at the ship's side; it shall discharge overboard or through fire hose at side of house; and to draw from sea, bilge or tanks, six 2½-inch fire plugs shall be located on main deck as directed. Furnish two reducers for 1-inch hose on deck.

179. *Relief Valves*.—Relief valves shall be attached to the discharge of all pumps, discharging into the suction pipe.

180. *Boilers*.—There shall be four boilers, Scotch return tubular type 14.5 feet diameter and 12 feet long. To have three 42-inch corrugated furnaces each, 3¼-inch tubes, well rolled in tube sheet and ends beaded over. Boilers to have butt straps inside and out, and to conform in every respect with the requirements of the United States Inspectors of Steam Vessels, for a working pressure of 140 and 160 pounds for the furnaces. Dry pipes shall be placed in each boiler, 8 inches in diameter, and to have two hundred (200) ¾-inch holes or slots of equivalent area. Uptakes of all boilers to come together, and to have one stack of nine feet inside diameter. There shall be an air space of 3 inches and an outer stack provided 9 feet 6 inches in diameter. Both stacks to extend above top of house as shown and to have six wire guys ⅝-inch in diameter, each to be set up with lanyards and dead eyes. A damper shall be fitted. Air space over uptakes covered with asbestos. Covering on uptakes 1½ inches thick, on boiler 2

inches thick, of asbestos and magnesia; this shall be covered with No. 24 galvanized iron. Bucket racks of iron around stacks to take twelve buckets. Spring pop safety valves for each boiler. Bottom and surface blow; stand pipe with gauge glass; one 1-inch drain cock; three try cocks, and a common drain for all cocks to bilge for each boiler. Furnace bars, bridge walls, lazy bars, fitted in place. Four extra sets of grate bars, and four sets of fire tools with hooks to hang same on. Four steam gauges in boiler room. Ash pans to be fitted to all furnaces. Sheet-iron baffle plate in front of boilers to keep ashes out of bilges. Saddles to be of steel 22½ pounds, and fastened to hull. Braces from boiler to hull shall be furnished and fitted. Fire room floor to extend back to steel bulkhead. Steel floor plates. Four heavy ash buckets. Sixteen wrought-iron baskets suspended from braces, with zinc, shall be furnished. Wrought-iron gratings shall cover boiler hatch at main deck. All necessary hand and grab rails shall be furnished and placed where directed. Escape pipe to be placed inside of stack. Make such connections to one of the pumps that circulation can be maintained in any boiler when raising steam. Feed pipes to discharge between the curtains. Boilers shall be equipped for burning either oil or coal and so arranged that the change from one to the other can be easily made. The furnaces shall be provided with extension fronts and the burners and general system shall be the "Kirkwood" or other system approved by the Engineer. All necessary pumps, blower, heater, etc., shall be supplied, using air to atomize the oil.

181. *Donkey Boiler*.—Place where shown a donkey boiler about 4 feet diameter and 8 feet high equipped for burning coal. The stack from this shall lead into the main stack; the boiler shall be built for 140 pounds pressure, and be supplied with all necessary gages, cocks, fire tools, etc.

This boiler to be so connected that it can be used for operating the various pumps, heating system and the oil heater and burners until the main boilers are in operation.

182. *Ash Ejector*.—Two approved 6-inch hydropneumatic ash ejectors, shall be furnished and set up complete, ready for use. At the discharge end put in a removable wearing piece and at all bends in the discharge pipe thicken the outside portion and make it removable. Furnish pattern of removable piece and bends.

183. *Tanks*.—There shall be four 105-gallon tanks, with lock faucets with 4 keys, drip pan, and filling pipes from deck. Fastened in place where directed.

184. *Whistle*.—One 10-inch single chime whistle, with double pull to pilot house shall be put in.

185. *Tools*.—Install in engine room a tool board fitted with 3 monkey wrenches, 3 Stillson pipe wrenches, 3 screw drivers, and 8 open-end wrenches, hammer and pliers all finished, held in place with brass buttons. Wrenches, in racks at convenient places, shall be furnished for all nuts around engines and pumps. Set on brackets four small oil tanks of copper, 10-gallon capacity each with faucets. Furnish 12 steel oil cans, 8-ounce, six long and six short spouts, and two brass oil sets on tray five pieces each.

186. *Bells and Speaking Tubes*.—There shall be one 20-inch and one 12-inch gong in the propelling engine room, and two jingle bells, with pulls in pilot house and on operating deck leading to gongs and jingle; also a 1½-inch brass speaking tube from pilot house to engine room, with whistle at each end and a 1½-inch sounding tube of brass. Pulleys shall be used for all bell pulls. Put in also a 1½-inch speaking tube from the pilot house to the operating deck aft of the stack with whistle at each end. Pulls to starboard engine to have open handles, those to port closed. Wire to be of brass.

187. *Electric Bells.*—There shall be electric bells from captain and inspector's rooms to engineer's, mate's, steward's, and quartermaster's rooms; also from each state room to galley, with indicator. The contractor shall furnish dry battery for these.

188. *Steam Piping.*—There shall be five distinct lines of steam piping with separate stop valves near boiler; two for propelling engines, one for each pumping engine, and one for the auxiliary engines. They shall be of copper, to stand a working pressure of 160 pounds of steam, and conform to the rules and regulations of the United States Inspector of Steam Vessels. There shall be a bleeder pipe from main steam pipe to condenser. Small pipes leading from auxiliary steam pipe shall be of sufficient size to supply all small pumps and auxiliary machinery. Steam and waste pipes to heaters in all rooms except pilot house, shall be of iron, galvanized. All iron pipe shall be galvanized.

189. *Steam Separator.*—There shall be placed on the steam pipe to each main engine an approved centrifugal steam separator of ample size. This shall be supplied with gauge glass and drain to filter tank.

190. *Valves and Cocks.*—All valves shall be Lunkenheimer's or equal. All steam and suction valves to be brass, mounted; all pump, discharge, and exhaust valves to be gate valves. There shall be a combined stop and check valve close to suction and discharge of feed and fire pumps; outboard valves, iron bodies, brass mounted, brass strainers, shall be fitted to all suction. Sea cocks and throttle valves shall be furnished by the contractor. All valves $2\frac{1}{2}$ inches and under shall be entirely of brass.

191. *Filling Plugs.*—All tanks and oil cans shall have filling plugs on deck with screw caps and the necessary piping.

192. *Ash Chutes.*—The contractor shall furnish 3 ash chutes with brackets to fit rail.

193. *Injection Valve Seats.*—These shall all be located forward of the forward overflow of the forward bin to avoid taking sand. The plating at all openings shall be reinforced. The openings shall be covered with composition strainers with area of opening at least twice that of the valve openings. Strainers to be attached to the injection seat castings, and provided with renewable zinc protecting strips. All to be flush with plating. The valve boxes shall be provided with facings for connection of flanged steam pipe for clearing them of ice.

194. *Labels.*—All valves and cocks, except such as may be otherwise directed, shall have attached brass plates showing their use and the direction of opening, and all hand levers, quadrants, speaking tubes, electric bells and annunciators shall be similarly marked. Marks shall be deep and filled with black cement.

195. *Pipe Coverings.*—All steam and exhaust pipes shall be covered with magnesia. Number 6 cotton canvas shall be sewed on over the magnesia.

196. *Thermometers.*—Furnish 4 mercurial thermometers, Hohmann & Maurer or equal, one on suction and discharge of condenser and two on heater.

197. *Lower Engine Room Floor.*—The lower floor of the propelling engine room shall be covered with checkered steel floor plates, $\frac{1}{4}$ -inch thick. At the sea and bilge valves the plates shall be removable.

198. *Painting.*—The engines, tanks, pumps, and boilers shall have 3 coats of white lead. All pipe covering shall be treated in the same manner.

199. *Steam Heating.*—Carry steam pipe to all heaters, putting reducing valve on line.

200. *Toilet Supply.*—All basins, closets, and baths are to be supplied with water from the place in which the dredge is working. The intake for this water shall be located well forward of the overflows of the forward bin.

201. *Refrigerating Plant.*—This shall be an approved direct expansion, automatic, anhydrous ammonia plant operated by an electric motor. The plant shall be of such size and have such a length of pipe in the refrigerating room that it will keep the temperature of the latter at 34 degrees F. when the outside air is 96 degrees in covered places, operating not more than 12 hours per day. When delivered the plant shall be fully charged with ammonia and two spare drums shall be furnished. This refrigerating plant shall be mounted on an approved steel platform in the lower hold aft of the after bin. From near the compressor carry a 12-inch galvanized-iron ventilator up through the after house and on top put a ventilating top. In the bottom end of this ventilator put an exhaust fan operated by an electric motor. The switch for controlling this motor shall be located in the engine room. The plant shall be supplied with all necessary gages, instruments, tools, etc.

202. *Gage Board.*—In the engine room mount a gage board containing one 8-day clock, chronometer lever, steam receiver and vacuum gages for propelling engines. Clocks and gages to have polished cast-brass cases, with dials about 8 inches diameter for the propelling machinery and 6 inches for the pumping machinery.

PUMPING MACHINERY.

203. *Finish and Tests of Material.*—The finish and tests of material shall be the same as is prescribed for the propelling machinery.

204. *Pumping Engines.*—The pumping engines shall be two in number, directly connected to the 20-inch sand pumps. Bed plates of pump and engine to be bolted together. Type of engine, vertical, inverted, compound, condensing, with cylinders, 17 inches and 36 inches, stroke

18 inches. To be provided with piston valves for high-pressure cylinder, double ported, slide valve for low pressure. Both cylinders to be fitted with relief valves, top and bottom. Crossheads to be of the flat slipper guide pattern. Crank pin brasses lined with best babbitt metal. A multiple collar thrust bearing shall be attached. Collars for thrust bearing shall be turned on shaft. Engine to be fitted complete with automatic sight feed oil service to all bearings. Oil tank brass 2-quart capacity with wick feed shall be provided, to which all sight feeds shall be attached. A complete water service shall be furnished. All places where oil can accumulate shall be lined with lead and have drain cocks. Brass fenders, edges wired, shall be placed where directed to prevent the throw of oil from cranks. Cylinders to be covered with non-conducting material, and neatly lagged with Russia iron held by brass bands. Metallic packing shall be used for piston rods, United States or other equally good. All cylinders to have indicator rigs, including one three-way cock to each cylinder. Engines to exhaust into condenser and also to have atmospheric exhaust, and have an approved shaft governor.

205. *Bells.*—There shall be two 10-inch brass gongs, located where directed, with pulls located on the bridges as directed; gongs shall be of distinctly different tone, and different from that of the propelling engines.

206. *Dredging Pumps.*—To be 20-inch, of centrifugal type, and extra heavy construction of cast-steel, especially adapted for dredging, as shown on the accompanying drawings. The interior of back head of pumps are to be fitted with renewable lining plates of steel. Pump runner to be secured to shaft by taper fit, with key and nut. Pumps to be fitted with approved air exhausters on Y-pipe. Pumps and engines shall be set as per drawing. The number of revolutions of the discs of these pumps shall be between 180 and 200 per minute while dredging. Overhead

trolleys for handling heads. Template to which pump runners are bored shall be delivered with the pumps.

207. *Y-Pipe*.—Shall be made of cast-steel as shown on drawing. This valve shall be operated from top of house, and main deck.

208. *Suction and Discharge Pipes*.—The United States will furnish at a railroad station or wharf convenient to the works of the contractor, the steel suction pipe, drags and flexible joints. These will be drilled and finished. The contractor shall pay the freight charges for delivery at his works, and install them on the dredge, furnishing the chain slings and bands shown. Blocks from which suction pipes are suspended shall have 30-inch cast-iron sheaves with bushing and all made to swivel. Number of sheaves in blocks to be as shown. The suction elbow, swivel joint, Y-pipe and connections to pump and casting at ends of discharge pipe shall be of cast-steel. The discharge pipe between the Y-pipe and end castings shall be of lapwelded steel pipe $\frac{3}{8}$ -inch thick, $21\frac{1}{4}$ inches inside diameter, with flanges riveted on, the bends being formed by bending a piece of pipe. The pieces of this pipe shall be in uniform lengths, the necessary adjustment to the ship being made by small cast-iron space pieces.

209. *Steam Hoisters*.—There shall be two steam hoisters, Lidgerwood, or other equally good. They shall have double cylinders, and be built to reverse with links. Each engine shall have two drums for hoisting and lowering the suction pipes; drums to be turned; if the two drums are on the same shaft, the ratio of diameters to be such as to cause little bending in the flexible joint; if gearing is used, the same ratio to be maintained by different rates of revolutions. Cylinders to be 10-inch diameter by 12-inch stroke. Engines to be right and left handed. Throttles and brake to be operated from top of house. Put rollers and pans under leads as directed.

210. *Piping*.—The steam, exhaust, also water service pipes, to be of copper and brass; exhaust pipes from auxiliary to connect to heater. There shall be a valve in each exhaust pipe, between engine and heater. Auxiliary machinery shall also be provided with atmospheric exhaust.

211. *Tools*.—There shall be a complete set of wrenches for engines, pumps and 12 for suction pipes.

212. *Cover to Discharge Pipes*.—Where the discharge pipes come through the deck the opening around pipes shall be made tight.

213. *Chutes*.—There shall be chutes built for the discharge pipes, of $\frac{1}{4}$ -inch steel at sides and top, $\frac{1}{2}$ -inch on bottom, with gates as per drawing. These chutes shall have distributing doors in the sides and bottom as shown, and shall be covered with steel.

214. *Wire Falls*.—There shall be 8 pliable plow steel wire falls furnished. Four of these to be $\frac{3}{4}$ -inch diameter, and four to be $\frac{5}{8}$ -inch diameter. These shall be long enough to successfully operate the suction pipes in 45 feet of water, when the ship is light.

215. *Painting*.—The contractor shall paint all engines, suction and discharge pipes, pumps, and chutes three coats of white lead paint; last coat to be applied after the trial, prescribed in Par. 234.

216. *Gage Board*.—On gage boards near the pumping engines shall be mounted steam and receiver gages for each engine, a vacuum gage and a gage on discharge of each pump.

217. *Hoisting Davits*.—These shall be constructed as shown with braces and guys. The springs on the davit heads shall be of the construction shown, 3 on each head. Each spring shall be wound from such a size of wire that the coils shall not close up metal to metal under a load of less than 10,000 pounds for each coil.

ELECTRIC LIGHT PLANT.

218. *General Description.*—This shall consist of two engines and generators of 15 kilowatts, capacity 110 volts each, 6 pole. Each set shall be secured on a common bed plate, have a solid shaft, and be securely mounted in the engine room. The bed plates shall rest in metal pans, with edges turned up 2 inches, to catch waste oil and water; the pans shall rest on and be secured to wooden bases not less than 2 inches in thickness, to deaden vibration. All parts must be accessible for examination, adjustment and repairs. Oil guards shall be provided where necessary. The sets must be thoroughly balanced, run true, and must be able to run under full loads for long periods, without undue heating or wear. The generating sets shall be provided with durable water proof coverings and all necessary tools, together with wrenches and tool board. The driving shafts shall be fitted with collars, which will prevent a movement of the shaft in the direction of its length. This shall be of the General Electric Company's type or equal. Put reducing valve on steam lines. The generator shall operate either singly or in parallel.

219. *Switch Board.*—There shall be one large 2-panel switchboard. This shall be of slate, 1¼-inch thick, finished with paraffine and supported on angle iron frame where directed. It shall be provided with a suitable water-proof covering, and shall contain switches for each dynamo and on it shall be mounted:

Independent switches for each circuit.

2 round pattern Weston voltmeters, reading to 150 volts.

1 round pattern ammeter, reading to 150 amperes.

2 shunt rheostats to regulate voltage from 10 volts below normal to 10 volts above.

2 two-point voltmeter switches.

1 two-light ground detector.

- 1 two-point ammeter switch.
- 2 150-ampere double-pole, double-throw knife switches, with 150 ampere fuses.
- 2 110-volt pilot lamps on goose-neck brackets.
- 2 approved circuit breakers.

And there shall also be furnished:

- 1 magneto bell with 25-foot leads.
- 1 15 to 150-volt portable voltmeter with 25-foot leads.

220. *Circuits.*—Six separate circuits shall be run, one for the projector, one for the engine room and boiler room, one for crew's quarters forward, one for midship deck house, one for after deck house and crew's quarters, and one for refrigerating plant and ventilator. Suitable resistance coils, mounted on non-combustible frames, shall be supplied as a dead resistance for projector mains; terminals shall be furnished and located for the following lights:

221. *Lamps Required.*—16 c. p.

- 13 in pilot house and room aft.
- 18 in petty officers' quarters forward.
- 2 in chain locker water tight.
- 3 in lower hold forward.
- 8 in sides forward bin.
- 8 in room over boilers.
- 4 over discharge chutes, hooded.
- 6 lower boiler room.
- 10 upper engine room.
- 16 lower engine room.
- 8 sides after bins.
- 32 officers' quarters aft.
- 24 lower quarters aft.
- 12 lower hold aft.

16 on sides of houses.

20 additional to be located later.

12 portable light plugs with 50-foot leads.

8 W. T. plug receptacles on sides of houses.

All to be supplied with key switches.

50 c. p. lamps.

2 lamps for side lights.

1 lamp for mast head.

4 c. p. lamps.

2 lamps in binnacle in pilot house.

(Binnacle to be supplied by United States.)

222. *Searchlight*.—An approved searchlight of 35 amperes capacity, and equipped with pilot house attachments, shall be erected on said pilot house, and controlled from within. It shall be automatically regulated without the use of springs, with silvered reflectors 18 inches in diameter. The searchlight circuit shall lead from the switchboard to the pedestal furnished for the searchlight having no connection with the incandescent circuits. The area of the cross section of the conductors shall not be less than 500 circular mills per ampere at full load. A suitable resistance coil on non-combustible frame shall be supplied and fitted in dyamo room or at a controlling stand as a dead resistance for searchlight mains. Furnish an extra set of glass strips for front, canvas cover, tools and 25 pairs of carbons. This shall be of the General Electric Company's make or equal.

223. *Lamps*.—The lamps shall be designed for the 110-volt system of 3.5 to 4 watts efficiency. They shall have water-tight base connections and be interchangeable in their sockets. The filaments must not drop when the lamps are placed horizontally. The lamps must be of the best quality and finish, and all those of the same candle power shall be uniform in size. All leading-in wires and

anchors must be fused in glass; all anchors must be made of metal. Each lamp must be marked on the inside of the bulk with the date of manufacture, and shall have its rated candle power, the voltage necessary to give this candle power, and the name of the manufacturer, conspicuously labeled on the outside of the bulb. The material used for connecting the base to the bulb must be so treated as to insure against danger of short-circuiting the lamp when exposed to moisture. The contractor will be required to guarantee that all lamps shall have an average life with full candle power of 600 hours. Twenty-five additional 16 c. p. lamps, with three 50 c. p. lamps, shall be furnished by the contractor. The side lights and head-light lamps shall be keyless; they shall be properly set and wired; the lights to be controlled by two switches with fuses placed in the pilot house. Furnish 4 additional 4 c. p. lamps.

224. *Running Light Telltale Board.*—There shall be one running light telltale board located in the pilot house, such as is manufactured by the General Electric Co., page 43 of their 1900 catalogue, or equal.

225. *Wiring.*—The wiring through the ship shall be of the Greenfield Lead covered Flexible Steel Armored Conductors, or other equally good. All junction boxes to be made water tight.

226. *Safety Fuses.*—Except for single lamp circuit, safety fuses shall be provided for all switches, and at the beginning of all branches which are of smaller sizes than the leads from which they are derived. Each fuse must carry the current for which designed and open the circuit when this current exceeds the normal current by one-third. A 200 per cent. extra supply of fuses shall be furnished. These shall be of the water-tight type.

227. *Design and Fixtures.*—The following standard

electric fittings shall be furnished and fitted as herein specified: Fixtures in galleys, Plate No. 23, No. 601. Captain's room, spare room, engineer's room, mate's room, inspector's room, Plate No. 10, No. 521; in the above-mentioned rooms there shall be two-light ceiling fixtures, Plate No. 21, No. 649. Bath rooms, captain's spare rooms, inspector's room, shall have one fixture each, Plate No. 15, No. 551. Officers' mess room, two ceiling fixtures, Plate No. 23, No. 601. Petty Officers' mess room aft, two ceiling fixtures, Plate No. 23, No. 601. The balance of the fixtures shall be from Plate No. 22, No. 321. Portable hand lamps, Plate No. 14½, No. 5. Fire room fixtures, Plate 14½, No. 674. Side lights, Plate 8½, No. 678. Mast head light, Plate 8½, No. 682. Two anchor lights, Plate 8½, No. 681. The above side mast head and anchor lights shall be fitted for oil as well as electricity. The above fixtures are taken from Page Brothers & Co., 347 Cambridge Street, Boston, Mass.; Catalogue No. 12. Those furnished, if not the same as above, shall be equally good, of a similar design, and of the same finish. All the above fixtures shall have an oxidized bronze finish.

GENERAL PROVISIONS.

228. The purpose and spirit of these specifications are that the contractor is to provide and deliver a staunch dredge hull and first-class machinery complete in every respect; and any parts or appurtenances essential thereto, although not specifically mentioned in these specifications, shall be provided by the contractor without additional cost to the United States. The successful bidder must guarantee the materials and workmanship to be first-class in every respect.

229. *Reputation of Bidders.*—The reputation of the

bidder as a builder of sea-going ships, and the adequacy of his resources and facilities for doing the work bid on within the time stated in his proposal, will be considered in making award. Each bidder will state, in his proposal, what ships, intended to be habitually used at sea, he has built, giving character and gross tonnage of each and length of time, after date of contract order, occupied in building.

230. *Proposals.*—The right is reserved to make such award as, taking into consideration all questions affecting the total cost, shall be deemed most advantageous to the United States.

231. *Time of Completion.*—Each bidder must state length of time, after notification of approval of contract within which he will agree to complete the work bid on. The time for completion is important and will be considered in making award.

232. *Storage for Outfit.*—The contractor shall furnish a safe, dry and suitable place approved by the Engineer, for storage of removable outfit furnished by the United States for the dredge, and shall be responsible for all damages to this outfit by fire or water while it is in the storage place. The outfit will be supplied by the Government and delivered at such time in advance of the completion of the contract as may be convenient to the Government. All necessary hauling from the railroad to the store-room and from the store-room to the dredge, and the labor for putting on board shall be furnished by the contractor. All the above shall be furnished by the contractor without additional cost to the United States.

233. *Office for Inspector.*—A suitable office, properly furnished with suitable desks, tables, chairs, water cooler, wash stand, wash bowl, pitcher, soap and towels, heated and lighted, shall be provided by the contractor for the use

of the inspector and his assistants, if any, and if hull and machinery are built at two or more different points, two or more such offices, if found necessary, shall be provided. All the above shall be furnished by the contractor without additional cost to the United States.

234. *Trials.*—Upon the completion of the dredge, with all parts and appurtenances pertaining thereto, as required by these specifications, except cleaning, painting, etc., below indicated, the vessel and all machinery and parts thereof shall be given a sea trial, extending over as many days as may be necessary, under conditions, as nearly as may be, analogous to those under which she is expected to work in actual practice. This shall be made at a point as near as practicable to the place of construction, satisfactory to the Engineer and where proper material at proper depths can be found. Three days of actual dredging work will be required in this test, the time of going and returning being dependent upon the locality of construction. A full-speed run of four consecutive hours will also be required. These trials shall be made under the direction of the Engineer and at the expense of the contractor. Should defects develop during this test, due to defective workmanship or material, or to plans furnished by the contractor and proved to be unsuitable, even though they had been preliminarily approved, they shall be made good by the contractor, after which the dredge will be again tested as above, for such length of time, not exceeding three days, as may be necessary. If the second test still shows the existence of defects, correction will be made, and the dredge tested again, and if necessary, this process shall be repeated until the dredge is found satisfactory in all respects. The dredge shall then be cleaned thoroughly and put in first-class shape, dry docked, and painted before being turned over to the United States. The contractor shall furnish without cost

to the United States a convenient berth at which she may lie during the time necessary, after completion of painting, for putting aboard her outfit. Inclining experiments to locate metacenter shall also be made once when directed. When the dredge is ready for final trial and the tenth payment is made (paragraph 239) the dredge shall be regarded as completed within the meaning of paragraph 4 of these specifications, so far as the liquidated damages are concerned.

235. *Delivery.*—The contractor shall deliver the dredge complete at the point where either the hull is constructed or the machinery is installed, as indicated by him in his proposal.

236. *Final Trial of Machinery.*—After completion of the dredge as specified in Par. 234, and before acceptance, she will be given a trial of 30 working days, and all parts of the machinery which give out or show undue wear during this time, shall be replaced at the expense of the contractor, provided the defects are due to defective workmanship or material, or to plans furnished by the contractor and proved to be unsuitable, even though they had been preliminarily approved. Delay caused by such failure and replacing shall not be counted as part of the 30-days' trial. This 30-days' trial will be made by the United States by the regular crew of the dredge after she has arrived at Galveston Harbor, or other point selected by the Engineer. When practicable and when it appears that no additional cost to the United States will probably be incurred by the delay caused by notifying the contractor, he will be so notified and directed to replace defective or broken parts; otherwise the defective or broken parts will be replaced by the United States. On receiving such notice, the contractor shall at once proceed to replace the defective or broken parts in as short a time as the United States could replace

them, counting said time from the date of receiving the above notification. If the contractor refuses to replace said defective or broken parts, or delays in doing so, the United States will replace them, charging the cost of replacing to the contractor, as well as any actual loss due to the delay in replacing.

237. *Spare Parts*.—There shall be furnished as spare parts:

1 suction elbow.

1 swivel joint and stuffing box for suction pipe, complete.

1 distance piece for dredging pump.

1 suction head for dredging pump, including inner and outer rings.

1 dredging pump periphery, bottom half.

1 dredging pump periphery, top half.

1 dredging pump back head liner.

1 dredging pump Y-Pipe complete.

All the above shall be so made that they can be used on either pump.

There shall also be furnished:

2 dredging pump back heads, 1 port and 1 starboard.

2 dredging pump runners, 1 port and 1 starboard.

2 dredging pump shafts with nuts, 1 port and 1 starboard.

All the above, together with the other castings used in the construction of the pumps and pipe lines, shall be drilled to template and the templates (of steel) furnished with the dredge. All shall be of the material previously specified for these parts.

There shall also be furnished, two complete sets of bolts for the entire pump and suction system, one-fourth of a set of follower bolts and nuts for each steam piston of main and pumping engines, one-fourth of a set of springs

for each piston, one crown and one butt brass for crank pin of main and pumping engines, one set of cross-head journal brasses of one main and one pumping engine, one complete set of metallic packing for each stuffing box, one set of water valves for each pump, one set of brasses for valve gear for one cylinder of main and one cylinder of pumping engine, twelve shaft-coupling bolts for main shaft, six bolts for pumping engine shaft, twenty-five condenser tubes, fifty tube glands, with tool for setting up, and twelve patent boiler tube-stoppers; also two approved steam tube-cleaners with the necessary lengths of steam hose and connections.

238. *Patterns*.—There shall be furnished a complete set of patterns of all the cast spare parts, called for and pattern for the end castings on discharge pipe. These patterns shall be well and substantially made so that at least 12 moulds can be made from each in the future. Full patterns will be required for all parts except pump shell and runner. The patterns shall be well boxed and crated, the patterns for no two different articles being in the same crate or box, and the package plainly marked with the contents. These boxes or crates shall be put together with screws so that they can be used several times. These patterns shall be delivered either on board the dredge or at a railroad station or steamer wharf, as may be desired by the Engineer. The cost of the above requirements as to spare parts and patterns should be included in the price bid for the dredge. Patterns for worm and wheel of gate mechanism also to be furnished.

239. *Payments*.—Provided the requirements of these specifications are complied with, and funds are available therefor, nine payments, each of 10 per cent. of the total consideration of the contract, will be made, based on the report of the inspector; the first when the dredge as a whole is 10 per cent. completed; the second when 20 per

cent. is completed, and so on, the ninth such payment being made when the dredge is ready for the trials prescribed in Par. 234. From each of these payments 10 per cent. will be reserved. After being turned over to the United States as provided in Par. 236, the tenth payment of 7 per cent. will be made, and all reserved percentages paid to the contractor. The eleventh and final payment of 3 per cent. will be made after the successful completion of the final trial of machinery described in Par. 236, and delivery of the dredge to the United States. Payments will be made by check on the United States Assistant Treasurer at New York. In making up percentages of completion, material and accessories specially ordered for this work and unsuited for stock or for other work will be counted; provided, they are first delivered at the shipyard and satisfactory evidence presented that they have been fully paid for.

240. *Ownership.*—All parts paid for under the system of partial payments above specified shall become thereby the sole property of the United States, but this provision shall not be interpreted as relieving the contractor from the sole responsibility for the proper care and protection of said parts prior to the delivery of the dredge of the United States, or from any other of the provisions of these specifications.

The successful bidder will be required to enter into contract, authorizing the United States, in case of default or failure upon the part of the contractor to go forward with the work and make satisfactory progress toward its completion, to annul the contract as provided in the form of contract to be entered into, and take possession of the contractor's plant and yard, as well as all machinery, tools, and appliances appertaining thereto necessary to be used in finishing the dredge, and any material on hand intended to

be used in its construction, or to remove the dredge and material to other plants or yards, as the Engineer may determine, the title to said dredge and material to vest in the United States forthwith upon said annulment of the contract. In such event the contractor shall be liable for any excess of cost of the construction of the dredge over the price named in the contract.

241. *Insurance.*—It is expressly understood and agreed that, preceding each payment, the contractor is to have the dredge insured against fire and marine risk at his own cost for and in behalf of the United States, in the name of the Engineer who will enter into contract for building the dredge, to at least the amount of said partial payment, and is thereafter to keep the said property insured to at least the full aggregate of the payments made upon it by the United States, until final acceptance.

242. *Blue Prints.*—The contractor shall furnish this office with two complete sets of blue prints and one set of tracings, of all drawings used in the construction of the hull and machinery, including piping and electric wiring; and will also furnish one complete set of the prints to the inspector. No work shall be started on any part of the machinery or dredge until drawings have been approved. This applies to all parts of hull and machinery, except such parts of the auxiliary machinery of which it is impracticable to furnish tracings. Of these, blue prints will be accepted.

243. *Orders.*—Two copies of all orders shall be furnished the inspector as soon as issued and immediate notice given of the receipt of all material or appliances for the dredge, and detailed list of same.

244. *Weights.*—The contractors shall furnish the inspector daily with the finished weights of all material, machinery, or fixtures that may be taken to the ship.

245. *Plate Index.*

- Plate 1. Lines.
 Plate 2. Midship section.
 Plate 3. Inboard profile.
 Plate 4. Outboard profile.
 Plate 5. Deck plans.
 Plate 6. Sections of bins.
 Plate 7. Miscellaneous details.
 Plate 8. Dredging pump.
 Plate 9. Engines.
 Plate 10. Boilers.

PROPOSAL FOR SEA-GOING SUCTION DREDGE.

.....1908.

To MAJOR J. C. SANFORD,

Corps of Engineers, U. S. Army,

815 Witherspoon Building, Philadelphia, Pa.

MAJOR:

In accordance with your advertisement of January 15, 1908, inviting proposals for constructing one sea-going suction dredge, and subject to all the conditions and requirements thereof and of your specifications dated January 15, 1908, we (or) I propose to furnish all the necessary labor and material except as specified to be furnished by the United States and to build the dredge complete in every respect and to deliver said dredge at.....

.....within months anddays from the date of notification of approval of contract, including time necessary for trials as described in said specifications, except the final trials of machinery described in Par. 236 for the sum of.....dollars andcents (\$.....).

[To be used ONLY when Guarantor is a Corporation.]

GUARANTY.

The
of..... a cor-
poration existing under the laws of the State of.....
....., hereby undertake that if the bid
of.....
herewith accompanying, dated.....,
1908, for

CONSTRUCTING A SEA-GOING SUCTION DREDGE

.....
.....
.....
.....
be accepted as to any or all of the items of supplies, mate-
rials and services proposed to be furnished thereby, or as
to any portion of the same, within sixty days from the date
of the opening of the proposals therefor, the said bidder
.....will within ten (10) days
after notice of such acceptance, enter into a contract with
the proper officer of the United States to furnish such
articles of supplies and materials and such services of
those proposed to be furnished by said bid as shall be ac-
cepted, at the prices offered by said bid and in accordance
with the terms and conditions of the advertisement invit-
ing said proposals, and will give bond with good and suf-
ficient surety or sureties, as may be required, for the faith-
ful and proper fulfillment of such contract. And said
corporation hereby binds itself and its successors to pay
to the United States, in case the said bidder shall fail to

enter into such contract or give such bond within (10) days after said notice of acceptance, the difference in money between the amount of the bid of said bidder on the articles or services so accepted and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the latter amount be in excess of the former.

In Witness Whereof, The name and corporate seal of said corporation has been hereto affixed this..... day of....., 1908, and these presents duly signed by ¹its..... pursuant to a resolution of its²..... passed on the..... day of A. D. 190 , a copy of the record of which is on file in the War Department.

Attest:

.....

³
 By.....

¹The president or officer authorized to sign for the corporation.

²The board of directors or other governing body of the corporation.

³Here affix the corporate seal.

[To be used ONLY when Guarantors are Individuals.]

GUARANTY.

We.....
 of....., in the
 County of.....
 and State of.....,
 and.....of.....
 in the County of.....
 and State of.....
 hereby undertake that if the bid of.....
herewith accompanying,
 dated....., 1908, for

CONSTRUCTING A SEA-GOING SUCTION DREDGE

.....

 be accepted as to any or all of the items and supplies, materials and services proposed to be furnished thereby, or as to any portion of the same, within sixty days from the date of the opening of proposals therefor, the said bidder.....
will within ten days after notice of such acceptance, enter into a contract with the proper officer of the United States to furnish such articles of supplies and materials and such services of those proposed to be furnished by said bid as shall be accepted, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement inviting said proposals, and will give bond with good and sufficient surety or sureties as may be required for the faithful and proper fulfillment of such contract. And we bind ourselves, our

heirs, executors, and administrators, jointly and severally, to pay to the United States, in case the said bidder shall fail to enter into such contract or give such bonds within ten days after said notice of acceptance, the difference in money between the amount of the bid of said bidder on the articles or services so accepted and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the latter amount be in excess of the former.

Given under our hands and seals this.....
day of.....nineteen
hundred and eight.

In presence of

..... as
to [Seal]*
..... as
to [Seal]*

*If executed in Maine, Massachusetts, or New Hampshire affix adhesive seal.

JUSTIFICATION OF THE GUARANTORS (INDIVIDUALS.)

STATE OF..... }
 County of..... } ss:

I,, one of the guarantors named in the foregoing guaranty, do swear that I am pecuniarily worth the sum of forty thousand (40,000) dollars, over and above all my debts and liabilities.

.....
 Subscribed and sworn to before me this.....
 day of....., 1908,
 at.....

STATE OF..... }
 County of..... } ss:

I,, one of the guarantors named in the foregoing guaranty, do swear that I am pecuniarily worth the sum of forty thousand (40,000) dollars, over and above all my debts and liabilities.

.....
 Subscribed and sworn to before me this.....
 day of....., 1908,
 at.....

.....
 'The oath to be taken before a notary public or some other officer having general authority to administer oaths. If the office has an official seal it must be affixed, otherwise the proper certificate as to his official character must be furnished.

I,².....do hereby
 certify that.....
 and.....the guar-
 antor above named,.....
 personally known to me, and that, to the best of my knowl-
 edge and belief,³ is pecuniarily worth,
 over and above all his debts and liabilities, the sum stated
 in the accompanying affidavit subscribed by him.

.....

I,do hereby
 certify that.....
 the guarantor above named, is personally known to me,
 and that to the best of my knowledge and belief, he is
 pecuniarily worth, over and above all his debts and liabili-
 ties, the sum stated in the accompanying affidavit subscribed
 by him.

.....

²This certificate to be by a judge or clerk of a United States court, a United States district attorney, United States commissioner, or a judge or clerk of a State court of record with the seal of said court attached. If the official can make the certificates as to both sureties, it will not be necessary to fill out the next form below.

³He or each.

In the Court of Claims of the United States.

No. 31281.

MARYLAND STEEL COMPANY OF BALTIMORE, MARYLAND,

v.

THE UNITED STATES.

II. Defendants' Answer and Cross Petition.

Filed Feb'y 15, 1912.

Come now the defendants, above named, by their Attorney General, and for answer to the claimant's petition and for cross petition on their own behalf allege:

I.

They admit that a contract existed between the claimant and the defendants, as set out in claimant's petition, and that from the full amount otherwise due the claimant upon said contract there was deducted the sum of \$4,750, because of the facts set out in the cross petition herein contained. But the defendants deny that there is anything due the claimant under and by virtue of the contract set out in claimant's petition.

II.

The defendants, for a cross petition, hereby claim a set-off in the said sum of \$4,750 so retained by the defendants from the amounts otherwise due the claimant under the contract herein sued upon. The defendants allege the facts in regard to said set-off to be as follows:

That heretofore a written contract was entered into by and between the Maryland Steel Company, the claimant herein, and the United States, for the construction of a single-screw steamer to be known as the General Joseph E. Johnston. That by the terms of said contract the said steamer was to be delivered to the Government on the 9th day of December, 1903, but that the Maryland Steel Company, the claimant herein, failed to complete and deliver said steamer until April 1, 1904, being ninety-five days after the expiration of the contract period, exclusive of Sundays and holidays. That the contract for the construction and delivery of said steamer contained the following provision as to liquidated damages:

Article 2. That the Maryland Steel Company shall complete the construction and equipment of the said steamer and deliver same to the party of the first part in New York Harbor, or as directed by him, in one hundred forty (140) days, exclusive of Sundays and legal holidays, from the date of this contract. And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, the loss resulting to the United States from such failure is

hereby fixed at the rate of fifty (\$50) dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the vessel is delayed beyond the period hereinbefore specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract. In the event of the act of God, war, fire, or strikes and lockouts of workmen affecting the working of this contract, the date of completion of the steamer may be extended for such period as may be deemed just and reasonable by the party of the first part, to cover the time lost from any of the above-mentioned causes.

That the Maryland Steel Company failed to deliver said steamer until ninety-five days beyond the contract date, which delay was wholly the fault of the Maryland Steel Company, and was to no extent whatever the fault of the Government. That by virtue of said delay on the part of the claimant there was justly due the Government \$50.00 as agreed liquidated damages for each of the ninety-five days beyond said contract date, amounting in all to the sum of \$4,750. That inadvertently and by mistake of fact the officers of the Government having direct charge of said payment paid the whole amount of the contract price for the construction and delivery of said steamer to the claimant, and failed to deduct therefrom the said sum of \$4,750, so fixed as liquidated damages in said contract. That the said overpayment was due wholly to the mistake on the part of the officer paying the same, and was not binding upon the United States, and that the said sum of \$4,750, so inadvertently, improperly, and illegally paid by the Government to the Maryland Steel Company, ever since said payment was and now is due from said company to the Government. That demand has been made upon said Maryland Steel Company for the repayment of said sum, which demand was refused, and the Maryland Steel Company has failed, neglected, and refused to return the same to the Government.

The defendants now claim, as a set-off to the amount otherwise due on the contract sued on by the claimant in this case, that said amount of \$4,750, so improperly, inadvertently, and illegally paid the Maryland Steel Company under the contract for the steamer Joseph E. Johnston, should be set off and allowed as against the payment of said \$4,750 so retained by the officers of the Government under the contract sued on in said claimant's petition.

The defendants therefore demand judgment in favor of them upon this cross petition for the said sum of \$4,750, and that the same be set off as against the amount otherwise due the claimant under the contract herein sued on by the claimant in its petition, and that judgment therefor be rendered in favor of the defendants.

JOHN Q. THOMPSON,
Assistant Attorney General.

S. S. ASHBAUGH,
Assistant Attorney.

85

In the Court of Claims of the United States.

No. 31281.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY, Claimant,

v.

UNITED STATES.

III. Claimant's Replication and Answer to Defendants' Set-off.

Filed April 15, 1912.

For answer to the defendants' set-off herein filed the claimant says there was such a contract, an extract of which is set out in the plea of set-off, but that before the expiration of the time as provided in said contract for the delivery of the vessel therein provided for and agreed to be built and, to wit, on the first day of December in the year, 1903, the proper officer and agent of the defendants under that contract, the Quartermaster-General of the Army, waived the limit of time within which said vessel was to be completed;

That the vessel was subsequently completed and the contract price paid therefor.

FREDERICK W. WOOD, *President.*

COUNTY OF BALTIMORE,

State of Maryland, ss:

F. W. Wood, being duly sworn says that he is the President of the Maryland Steel Company of Baltimore County and the Agent thereof, that he has read the foregoing answer and that the facts therein stated are true.

Subscribed and sworn to before me this 9th day of April, 1912.

[SEAL.]

JOHN H. K. SHANNAHAN, JR.,

Notary Public.

W. D. DAVIDGE,

Att'y for Claimant.

87

IV. Argument and Submission of Case.

On the 28th day of May, 1912, this case came on to be heard. Mr. Walter D. Davidge was heard for the claimant; Mr. S. S. Ashbaugh was heard in opposition, and the case was submitted.

88 *V. Findings of Fact, Conclusion of Law, and Opinion of the Court.*

Filed December 2, 1912.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY

V.

THE UNITED STATES OF AMERICA.

This case having been heard by the Court of Claims, the court, on the evidence, makes the following

Findings of Facts.

I.

The claimant herein is a corporation organized under the laws of the State of Maryland.

II.

On June 24, 1903, the claimant as shown by the evidence entered into a written contract with the United States through D. D. Wheeler, Assistant Quartermaster General, United States Army, for the construction and equipment of a single-screw steamer for harbor service of the Quartermaster's Department and submarine cable service, in accordance with the specifications made a part of the contract, for the consideration of \$88,000, to be paid in various amounts as the work progressed, less 10 per cent thereof withheld to make good any defects that might be due to inferior material or bad workmanship, in the absence of such defects said retained percentage to be paid within 60 days after the delivery and acceptance of said steamer, and the vessel to be completed within 140 days, exclusive of Sundays and legal holidays, or by December 9, 1903.

Said contract was subject to the approval of the Quartermaster General, United States Army, and was by him approved June 29, 1903.

III.

By the terms of said contract it was provided that if the claimant should fail to complete and deliver said steamer within the stipulated time it should pay to the United States the sum of \$50 per day as liquidated damages for each and every day so delayed, exclusive of Sundays and legal holidays, which amount it was provided might be withheld from any money due to the claimant under said contract, about which there is no controversy.

IV.

On December 1, 1903, before the time stipulated for completion had expired, and at the request of the claimant company, owing to unavoidable delays in procuring the necessary material, the

Quartermaster General, United States Army, within his discretion under the contract, orally waived the time limit in said contract for constructing and equipping said steamer, and subsequently on April 2, 1904, by letter to the Quartermaster General, confirmed such waiver, about which there is no controversy.

V.

The steamer so contracted for was completed, delivered, and accepted by the United States on April 1, 1904, or 95 days, exclusive of Sundays and legal holidays, after the time fixed in the contract therefor and on April 13, 1904, the Quartermaster General of the Army directed the depot quartermaster at New York to make final payment for said steamer, retaining, however, the 10 per cent to make good any defects there might be in the material or workmanship.

Thereafter, July 13, 1904, the entire sum stipulated to be paid by the defendants was paid without any deduction whatever.

Whether the claimant unreasonably delayed the work after the waiver of the time limit as aforesaid does not appear.

VI.

It is not shown that the United States suffered any actual pecuniary loss or damage by reason of the delay of the claimant in the completion and delivery of the steamer.

VII.

Thereafter, February 24, 1908, the claimant entered into another contract with the United States, made a part of the petition herein, by the terms of which the claimant agreed to build one steel hull twin screw suction dredge and furnish and install therein the propelling machinery, pumping machinery, electric light plant, and all other machinery and other parts required to be installed for the consideration of \$357,500, said work when completed to be delivered to the defendants at Sparrows Point, in the State of Maryland, which work was completed and accepted by the United States on January 6, 1909, and the claimant was paid therefor the stipulated contract price, less \$4,750, which the defendants claim was the amount arising as liquidated damages for the 95 days' delay of the claimant in the completion of the steamer under the first contract hereinbefore referred to and which amount the defendants further claim was inadvertently and under mistake of fact paid to the claimant company.

VIII.

Counterclaim.

The Government sets up by way of counterclaim the like sum of \$4,750, which, it claims, was due as liquidated damages for the 95 days' delay of the claimant in the execution of the first contract

hereinbefore referred to, which sum, it is claimed, was inadvertently, improperly, and illegally paid by the officers of the Government to the claimant, and defendants ask that, if any amount is recovered by the claimant under said second contract, the amount of said payment should be offset against the same.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition be dismissed.

Opinion.

PEELLE, *Chief Justice*, delivered the opinion of the court:

The claimant seeks recovery for a balance claimed to be due on a contract which was performed according to its terms and full payment therefor made except as to the sum of \$4,750, which the Government by its set-off in the nature of a cross petition alleges should have been deducted as liquidated damages under a prior contract for the failure of the claimant to complete the work thereunder within the contract time, notwithstanding the time limit had been waived and the claimant permitted to proceed with the work to completion and full payment therefor was made.

The claimant for replication admits that there was such a contract, but says that before the expiration of the time fixed therein for the completion of the work the Quartermaster General waived the time limit.

No reference is made in the petition to this prior contract, but the Government by its cross petition alleges that the amount deducted under the contract sued on was inadvertently and contrary to law paid to the claimant under said prior contract.

Said first contract provided for the construction, equipment, and delivery in New York to the Government of a single-screw steamer for harbor purposes, article 2 of which provided as follows:

"Article 2. That the Maryland Steel Company shall complete the construction and equipment of the said steamer and deliver same to the party of the first part in New York Harbor, or as directed by him, in one hundred forty (140) days, exclusive of Sundays and legal holidays, from the date of this contract. And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, the loss resulting to the United States from such failure is hereby fixed at the rate of fifty (\$50) dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the vessel is delayed beyond the period herein-
91 before specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract. In the

event of the act of God, war, fire, or strikes and lockouts of workmen affecting the working of this contract, the date of completion of the steamer may be extended for such period as may be deemed just and reasonable by the party of the first part, to cover the time lost from any of the above-mentioned causes."

It will be noted that time was of the essence of the contract and a breach thereof would have given the opposite party the option of treating the contract as discharged. *Slater v. Emerson*, 19 How., 224. On the other hand, had the contractor failed to perform within the specified time, the Government's permission for it to continue performance would have operated as a waiver of the breach. *Jeffrey Mfg. Co. v. Iron Co.*, 93 Fed. R., 408; *Davis v. Roberts*, 89 Ala., 402; *Barnard v. McLeod*, 114 Mich., 73.

In the present case the time limit within which to complete the work was orally waived by the Quartermaster General before the expiration of the time fixed in the contract therefor, and accordingly the claimant proceeded therewith and thereafter on April 1, 1904, completed the work. On the day succeeding the completion of the work, to wit, April 2, 1904, the Quartermaster General, United States Army, in writing, confirmed the waiver of the time limit as aforesaid, following which, by order of said Quartermaster General, the depot quartermaster at New York made final payment to the claimant for the steamer so completed under said first contract, less 10 per cent retained by way of indemnity for any defects that might appear in either the material or workmanship.

Thereafter, July 13, 1904, the percentage so retained was paid over to the claimant company. Thus the transaction under the first contract, it would seem, was closed.

Nearly four years thereafter, to wit, February 24, 1908, the claimant entered into a written contract, made part of the petition herein, whereby the claimant, for the consideration of \$357,500, agreed to furnish all the necessary labor and material therefor and to build one steel hull twin-screw suction dredge, and to furnish and install therein the propelling and necessary machinery, electric-light plant, etc., and to deliver the work at Sparrows Point, in the State of Maryland, which work was completed on January 6, 1909, and the claimant was fully paid therefor, less \$4,750, which was withheld as due under the first contract as liquidated damages for the 95 days' delay of the claimant in the completion of the steamer thereunder, notwithstanding the waiver of the time limit by the Quartermaster General and payment of said amount as aforesaid.

The verbal waiver of the stipulated time within which to perform work under a contract notwithstanding the act of 1862, 12 Stat., 411, requiring contracts to be in writing, finds support in the case of *Salomon v. United States*, 19 Wall., 17, 19; 7 C. Cls., 482, wherein Justice Miller, reversing this court, said:

"Whether we regard the delivery made in October as made under a verbal extension of the time stipulated in the original contract, or consider it as a new transaction in which the Government received and took possession of the corn, and used part of it and permitted the remainder to be injured in its hands, we think the claimant is equally entitled to be paid for it.

"The act of 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter accepting delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid.

"And if this were not so, when the quartermaster in charge receives of a person corn for the Government, gives a receipt and voucher for the amount and the price, and the Government uses such part of it as it wants and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster."

In the case of *District of Columbia v. Camden Iron Works*, 181 U. S., 453, 461, involving the construction of a similar statute, requiring contracts made by the Board of Public Works of the District to be in writing and signed by the parties, the court held in substance that the delivery of the material contracted for after the time specified in the contract did not constitute a new contract. See also *Williams v. Bank*, 2 Pet., 96, therein cited, and *Phillips Construction Company v. Seymour*, 91 U. S., 646.

But we do not understand the Government to seriously controvert the waiver of the time limit. It does, however, vigorously contend that notwithstanding the waiver the liquidated damage clause of the contract continued in force. The waiver of the time limit was before the expiration of the time agreed upon for the completion of the work and therefore no liquidated damages had then accrued. *Guyer v. Warren*, 175 Ill., 328; *Vandergrift v. Engineering Co.*, 161 N. Y., 435. See Page on Contracts, sec. 1157.

The Comptroller held that where time is of the essence of a contract and the default of the Government causes the contractor to delay in beginning and prosecuting the work, such default on the part of the Government operates to nullify the provision for liquidated damages, leaving the contractor liable only for actual damages. 14 Comp. Dec., 819. Such also was a decision of the Comptroller in 15 Comp. Dec., 362-368.

In the case of *District of Columbia v. Camden Iron Works*, *supra*, where the completion of the work was prevented by the delay of the Government, the court, in substance, held, following the decision in the case of *Williams v. Bank*, 2 Pet., 96, 102, that strict performance being prevented the claim for fines or penalties for delay could not be sustained.

In the present case, however, there is no contention that the Government was at fault or in any way responsible for the failure of the claimant to complete the work within the contract time. On the contrary, by reason of its inability so to do and at its request the time limit was waived by the Quartermaster General.

Had the Government prevented performance the date from which to assess liquidated damages would have been eliminated; but here the failure was alone the claimant's, and to hold that under such

93 circumstances the date from which to assess such damages was eliminated would be giving the claimant an advantage in its own wrong. Hence, it must be held that the waiver by reason of the default of the contractor did not operate in law to relieve it from the payment of the agreed damages. In other words, the waiver simply prevented the forfeiture of the contract and permitted the claimant to continue to perform subject to all the other provisions of the contract, and if thereafter the work was not done within a reasonable time the contract again became subject to forfeiture; but if instead of such forfeiture the claimant was permitted to continue to perform to completion, the provisions of the contract otherwise continued in force.

Any other ruling would deprive the Government of the agreed damages for its indulgence with the claimant, a defaulting contractor, and at the same time relieve it from the damages occasioned by its own default. Nor is it material whether the waiver was before or after default, as the claimant conceded its inability to complete the contract within the agreed time, and for that reason alone the waiver was granted.

There is a vast difference between this case and the United Engineering and Contracting Co. Case, 47 C. Cls. —, where the Government by its delay prevented the claimant from performance within the contract time. In such case the delay of the Government, in the absence of some contract provision therefor, operated in law not only to waive the time limit and give the claimant a reasonable time within which to perform but to eliminate the date from which, upon the default of the contractor, the agreed damages were to have been assessed; and that date eliminated by the default of the Government another or new date could not be fixed except with the consent of the claimant; nor can the continuance of the work by the claimant in such case be construed as continuing in force the liquidated damage clause of the contract, as there is no new date from which to assess such damages, and the claimant had not agreed to submit the fixing of such date to the arbitrary action of an officer of the Government or to a jury. *Mosler Safe Co. v. Maiden Lane S. D. Co.*, 199 N. Y., 479, 489, and cases there cited.

In the present case as the waiver was granted by reason of the default of the claimant such waiver did not embrace a release from the payment of the agreed damages, which were assessable upon its default. Under such circumstances an officer, in the absence of some provision of law or contract therefor, would have no authority to release a contractor from the provision for liquidated damages so arising.

The claimant, however, independent of the waiver, contends that the payment in full under the first contract was an accord and satisfaction conclusive on the Government. But this would not be so if the payment were made under a mistake of fact or contrary to law. *Wisconsin Central Railroad Co. v. United States*, 164 U. S., 190, 212; *McKee v. United States*, 12 C. Cls., 504; *United States v. Bank of the Metropolis*, 15 Pet., 377.

Where one party to an agreement gives and the other accepts, in

satisfaction of a claim in dispute, something other than or different from what he is or claims he is entitled to, such settlement will, in the absence of fraud, mistake, or duress, be considered an accord and satisfaction binding on both parties. But in the present case the claimant received and accepted what both parties at the time
 94 conceded to be due. True, there was some controversy as to whether the waiver of the time limit operated to deprive the Government of its right to liquidated damages, but the Quartermaster General construed this controversy in the claimant's favor and paid, not a different sum, but the exact sum claimed to be due. *Pickley v. United States*, 46 C. Cls., 77, 91.

The final question therefore is, Shall the settlement thus made stand? There are authorities to the effect that if liquidated damages be not deducted at the time of payment the right thereto is lost. *Hudson on Building Contracts*, p. 538 et seq. and cases there cited. But here again, if the payment was made in mistake of law the Government is entitled to recover it, as held in the case of the Wisconsin Central Railroad Co., *supra*, where, in this respect, quoting from the case of *Barnes v. District of Columbia*, 22 C. Cls., 366, 394, the court said: "The doctrine that money paid can be recovered back when paid in mistake of fact and not of law does not have so general application to public officers using the funds of the people as to individuals dealing with their own money where nobody but themselves suffer for their ignorance, carelessness, or indiscretion, because in the former case the elements of agency and the authority and duty of officers, and their obligations to the public, of which all persons dealing with them are bound to take notice, are always involved." The court then adds: "We concur in these views, and are of opinion that there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable *ex aquo et bono* to refund them."

It must therefore be held that the amount herein claimed having been inadvertently and illegally paid to the claimant under said prior contract the same was properly deducted under the contract in suit, and for this reason the claimant is not entitled to recover, and its petition is dismissed, which is accordingly ordered.

Howry, J., was not present when this case was tried and took no part in the decision.

At a Court of Claims held in the City of Washington on the 2nd day of December, A. D. 1912, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the petition of the said Maryland Steel Company of Baltimore County be and the same is hereby dismissed.

BY THE COURT.

96 *VII. Application for and Allowance of Appeal.*

No. 31281.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY, Claimant,
v.
THE UNITED STATES, Defendant.

From the judgment rendered in the above entitled cause on the second day of December, 1912, in favor of the defendant, the claimant, by its attorney, on the eleventh day of January, 1913, makes application for and gives notice of an appeal to the Supreme Court of the United States.

WALTER D. DAVIDGE,
Attorney for Claimant.

Filed January 13, 1913.

Ordered: That the above appeal be allowed as prayed for.
January 13, 1913.

BY THE COURT.

97 Court of Claims.

No. 31281.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion of the Court; of the judgment of the Court dismissing the petition; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 17th day of January, 1913.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 23,513. Court of Claims. Term No. 435. Maryland Steel Company of Baltimore County, appellant, vs. The United States. Filed January 20, 1913. File No. 23,513.

Office Supreme Court, U. S.

FILED

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JAMES D. MAHER
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1914.

—
No. 104.
—

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY,
Appellant,

v.

THE UNITED STATES.

—
BRIEF ON BEHALF OF APPELLANT.
—

ALEXANDER PRESTON,
WALTER D. DAVIDGE,
Attorneys for Appellant.

INDEX.

	Page
Statement of the Case.....	1
Assignment of Errors.....	8
Points and Argument.....	9
1. The Express Waiver	9
2. The Effect of the Express Waiver.....	15
3. The Effect of Payment in Full.....	17
4. The Payment was Deliberate and Under No Mistake	18
5. No Loss or Damage by Reason of Delay.....	21
6. Conclusion	26

CASES CITED.

Barnes v. D. C., 22 C. Cl., 366.....	19
D. C. v. Camden Iron Works, 181 U. S., 453.....	13, 16
Dodd v. Churton, 1 Q. B., 562.....	15
Flynn v. Des Moines R. R. Co., 63 Iowa, 491.....	16
Ford v. U. S., 17 C. Cl., 60.....	11, 20
Griffith v. U. S., 22 C. Cl., 165.....	18
Hathaway v. Lynn, 75 Wis., 186.....	24
Ittner v. U. S., 43 C. Cl., 336.....	14, 20
Kemp v. Rose., 1 Giff., 258.....	15
Mosler Safe Co. v. Maiden Lane S. D. Co., 199 N. Y., 479	16
Phillips Const. Co. v. Seymour, 91 U. S., 646.....	13, 16
Salomon v. U. S., 19 Wall., 17.....	9, 10, 11, 20
Shipman v. U. S., 18 C. Cl., 138.....	17
United Engineering Co. v. U. S., 47 C. Cl., 489, and U. S. v. United Engineering Co., No. 381, Oct. Term, 1913	16
U. S. v. Corliss Steam Eng. Co., 91 U. S., 321, and Same v. Same, 10 C. Cl., 494.....	17
Werner v. Finley, 129 S. W., 73.....	24
Williams v. Bank, 2 Pet., 96.....	13

IN THE
Supreme Court of the United States

OCTOBER TERM, 1914.

No. 104.

MARYLAND STEEL COMPANY OF BALTIMORE COUNTY,
Appellant,

v.

THE UNITED STATES.

BRIEF ON BEHALF OF APPELLANT.

THE CASE.

This is an appeal from the Court of Claims.

The petition of the Maryland Steel Company, of Baltimore County, claimant below, appellant here, alleged:

That on February 24, 1908, the appellant entered into a contract with the United States, made a part of the petition herein, by the terms of which the claimant agreed to build one steel hull twin-screw suction dredge and furnish and install therein the propelling machinery, pumping machinery, electric light plant, and all other machinery and other parts required to be installed for the consideration of \$357,500, said work when completed to be delivered to the defendants at Sparrows Point, in the State of Maryland, which work was completed and accepted by the United States on January 6, 1909. That the claimant did furnish the necessary labor and material and did build, furnish and install said hull, and machinery and plant, and did all the claimant had agreed to do under the terms and as required by said contract. All of which labor, material, work and construction were duly accepted by the defendants on the 6th of January, 1909, and that thereupon the claimant became and was entitled to receive the money due therefor.

That the United States, from time to time, paid the claimant as required by the terms of said contract, with the exception of \$4,750, which amount was then due and owing to the claimant from the defendants, exclusive of all setoffs and just grounds of defense, with interest thereon from the 4th day of November, 1908. The petition contained also the necessary averments that there had been no action on the claim set forth by Congress, but it had been disallowed by the auditor of the War Department; that the claim-

ant was the sole owner of said claim and solely interested therein, no assignment or transfer of said claim or any part thereof nor interest had been made. The said claimant was justly entitled to the amount therein claimed from the United States as allowed over all just credits and setoffs, and that the claimant had at all times borne true allegiance to the United States, and had not in any way voluntarily aided or abetted or given encouragement to rebellion against the United States. (R., 1-3.)

The defendants answered and filed a cross petition wherein they admitted the contract as above set forth and that from the full amount thereof they had deducted \$4,750 which they claimed as a setoff from the amount otherwise due the claimant under the contract sued on because of the following: That therefore a written contract had been entered into by and between the appellant and the United States for the construction of a single-screw steamer. That by the terms of said contract the steamer was to be delivered to the Government on the 9th day of December, 1903, but that the Maryland Steel Company failed to complete and deliver said steamer until April 1, 1904; being 95 days after the expiration of the contract period, exclusive of Sundays and holidays. That the contract for the construction and delivery of said steamer contained the following provision as to liquidated damages: "That the Maryland Steel Company shall complete the construction and equipment of the said steamer and deliver same to the party of the first part in New York harbor, or as di-

rected by him, in one hundred forty (140) days, exclusive of Sundays and legal holidays, from the date of this contract. And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, the loss resulting to the United States from such failure is hereby fixed at the rate of fifty (\$50) dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the vessel is delayed beyond the period hereinbefore specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract. In the event of the act of God, war, fire, or strikes and lockouts of workmen affecting the working of this contract, the date of completion of the steamer may be extended for such period as may be deemed just and reasonable by the party of the first part, to cover the time lost from any of the above-mentioned causes."

That the Maryland Steel Company failed to deliver said steamer until 95 days beyond the contract date, which delay was wholly the fault of the Maryland Steel Company, and was to no extent whatever the fault of the Government. That by virtue of said delay on the part of the claimant there was justly due the Government \$50.00 as agreed liquidated damages for each of the 95 days beyond said contract date, amounting in all to the sum of \$4,750. That in-

advertently and by mistake of fact the officers of the Government having direct charge of said payment paid the whole amount of the contract price for the construction and delivery of said steamer to the claimant, and failed to deduct therefrom the said sum of \$4,750, so fixed as liquidated damages in said contract. That the said overpayment was due wholly to the mistake on the part of the officer paying the same, and was not binding upon the United States, and that the said sum of \$4,750 so inadvertently, improperly and illegally paid by the Government to the Maryland Steel Company, was then due from said company to the Government. That demand had been made upon said Maryland Steel Company for the repayment of said sum, which demand had been refused.

That defendants then claimed as a setoff to the amount otherwise due on the contract sued on by the claimant in the case, that said amount of \$4,750 so paid to the Maryland Steel Company, under the contract for the steamer should be set off and allowed as against the payment of said \$4,750 so retained by the Government under the contract sued on in the claimant's petition, for which the defendants demanded judgment. (R., 81-82.)

For answer to said setoff, by way of replication, the appellant set up that before the expiration of the time as provided in the contract for the delivery of the steamer, on the first day of December, 1903, the proper officer and agent of the defendants under that contract, the Quartermaster-General of the Army

had waived the limit of time within which said steamer was to be completed and that the steamer was subsequently completed and the contract price paid therefor. (R., 83.)

The case was heard on the pleadings and proofs, and on December 2, 1912, the court dismissed the petition.

The court found as facts that the contract for the building of the steamer as set forth in the petition was properly executed and approved. That by the terms of said contract it was provided that if the claimant should fail to complete and deliver said steamer within the stipulated time it would pay the United States the sum of \$50.00 per day as liquidated damages for each and every day so delayed, exclusive of Sundays and legal holidays, which amount it was provided might be withheld from any money due to the claimant under that contract. (R., 84.)

That on December 1, 1903, before the time stipulated for the completion had expired, and at the request of the claimant owing to unavoidable delays in securing the necessary material, the Quartermaster-General, in his discretion under the contract, orally waived the time limit in said contract for the construction and equipment of said steamer, and subsequently on April 2, 1904, by letter, confirmed such waiver. (In finding of fact IV this letter is said to have been written to the "Quartermaster-General." This is a typographical error for "depot quartermaster," as will be admitted in the appellees' brief.) That the steamer so constructed was completed, de-

livered, and accepted by the United States on April 1, 1904, or 95 days, exclusive of Sundays and legal holidays, after the time fixed in the contract therefor, and on April 13, 1904, the Quartermaster-General of the Army directed the depot quartermaster at New York to make final payment on said steamer, retaining, however, 10 per cent to make good any defects that might appear in either the material or workmanship, and that thereafter, July 13, 1904, the entire sum stipulated to be paid by the defendants was paid without any deduction whatever. (R., 84-85.)

That it did not appear that the claimant below had unreasonably delayed the work after the waiver of time by the aforesaid. (R., 85.)

The Court also found as a fact that it was not shown that the United States suffered any actual pecuniary loss or damage by reason of the delay of the claimant in the completion and delivery of the steamer. (R., 85.)

That thereafter, on February 24, 1908, the claimant entered into another contract with the United States, made a part of the petition herein, by the terms of which the claimant agreed to build the twin-screw suction dredge as above set forth for the consideration of \$357,500 to be delivered to the United States at Sparrows Point, Maryland, which was completed and accepted by the United States on January 6, 1909, and that the claimant was paid therefor the stipulated price, less \$4,750, which the defendants claimed was the amount arising as liquidated dam-

ages for the 95 days' delay of the claimant in the completion of the steamer under the first contract and which amount the defendants *claimed* was inadvertently and under a mistake of fact paid to the claimant.

ASSIGNMENT OF ERRORS.

The Court below erred:

1. In dismissing the claimant's petition.
2. In holding that the waiver of the time limit from which liquidated damages were to be calculated did not toll the provision for liquidated damages.
3. In holding that the payment of the entire balance due under the contract for the steamer did not waive any claim for liquidated damages.
4. In holding in the absence of any proof that the payment of the entire contract price for the steamer was money paid under a mistake of fact or illegally paid.
5. In holding under the provisions of the contract for the building of the steamer that the finding (VI), that no actual pecuniary loss or damage to the United States had been shown, was not a complete defense to the claim for liquidated damages.

POINTS AND ARGUMENT.

I

Within the time limited for the completion and delivery of the steamer under the first contract the Government waived the time limit.

The time provided for the completion and delivery of the vessel under this contract would have expired on December 9, 1903. On the first of that month, however, the Quartermaster-General, the contract being made with his Department, orally waived the time limit. On April 2, 1904, he confirmed the oral waiver in a letter to the depot quartermaster who was to make the payments under the contract. And as the liquidated damages under the contract were to accrue only from the time limited for the completion of the steamer a waiver of the time limit was a waiver of the liquidated damages.

It is well settled that in such cases the waiver may be oral and is not required to be in writing. We are well aware of the fact that the act of June 2, 1862, requires contracts for military supplies to be in writing, but a waiver of a time limit in such a contract does not constitute a new contract.

The case of *Salomon v. United States* is conclusive on this point. Salomon entered into a written contract with the Quartermaster's Department to deliver at Fort Fillmore 12,000 bushels of corn at such times and in such quantities, of not less than 1,000 bushels per month, as the assistant quartermaster

should direct, 9,000 before January 1 and the whole amount by the 1st of May, 1865. The 9,000 bushels were delivered and paid for before the 1st of May, and about this there was no dispute. Salomon delivered the remainder of the corn at Fort Fillmore on October 15, 1865, by depositing it in the military storehouse at that place. The chief quartermaster's clerk afterwards examined this corn, weighed some of the sacks, counted the remainder, and gave to Salomon a receipt for the amount, stating that that completed his contract. The clerk then and there took actual possession of the corn and the chief quartermaster gave to Salomon the usual voucher for the sum due. The corn was sound when delivered, but was injured by the defective and leaky condition of the storehouse.

The Government declining to pay the amount of the voucher, Salomon filed a petition in the Court of Claims for payment. That Court decreed that he should be paid for a part of what he had finally delivered and which the Government had used, but not for the residue which had proved unserviceable and been lost by decay arising from the defective and leaky condition of the storehouse. Salomon appealed to this Court.

Said the Court by Mr. Justice Miller:

"Whether we regard the delivery made in October as made under a verbal extension of the time stipulated in the original contract, or consider it as a new transaction in which the Government received and took possession of the corn

and used part of it and permitted the remainder to be injured in its hands, we think the claimant is equally entitled to be paid for it.

"The act of 1862 (12 Stat., 411) requiring contracts for military supplies to be in writing is not infringed by the proper officer having charge of such matter accepting the delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid."

Salomon v. U. S., 19 Wall., 17, 19, 20.

This case really lays down a much broader rule than the one for which we are contending. We need not here go into the effect of acceptance after the time stipulated for delivery under a contract, for in the case at bar the Government actually—not by implication but actually—waived the time limit for the performance of the contract within the time provided for and before there was any default.

Where a contract to do certain work of repair and improvement on a canal required the work to be finished by the 31st of May, 1876, and on the 23rd of May, 1876, the chief of engineers ordered that the time specified for the completion of the work to be extended to the 1st of October, 1876, and by a similar order it was further extended to the 15th of December, 1876, the claimant recovered in the Court of Claims.

Ford v. U. S., 17 C. Cl., 60.

In that case there was no pretension that the provisions of the act of June 2, 1862, were complied

with. In other words, there was merely an extension of time under an existing contract, and not a new contract.

See also *D. C. v. Camden Iron Works*, 181 U. S., 453, a case originating in the District of Columbia where the act of June 11, 1878, required contracts to be in writing, signed by the Commissioners, copied into a book for the purpose, and so forth. The contract provided for the manufacture of certain designated sizes of iron pipe and its complete delivery to the District of Columbia within 136 days after the date of the execution of the contract. There was a provision that for failure to complete the work at the time specified, there should be deducted from the money to become due under the contract one per centum per week day on the value of each article overdue and undelivered, and the sum of \$10 per diem for the delay, estimated as liquidated and fixed damages to the District. The pipe should have been wholly delivered by November 10, 1887. But a small proportion of the pipe was delivered prior to November 30, 1887, but after that date pipe worth \$11,404.09 at the contract rates was delivered to and accepted by the District of Columbia and used by the corporation. The total value, at contract rates, of all the pipe delivered to and accepted by the District was \$16,335.87, on which there had been paid \$5,291.71. The Camden Iron Works sued to recover the difference. The District claimed that this was more than counterbalanced by the fines and penalties charged

up by the defendant for non-delivery of the pipes within the time specified in the contract.

The Supreme Court, affirming the judgment of the Court of Appeals of the District of Columbia, held the acceptance of the pipe after the time specified in the contract not to constitute a new contract but to be a mere waiver of further performance.

D. C. v. Camden Iron Works, 181 U. S., 453.

Phillips Const. Co. v. Seymour, 91 U. S., 646.

Williams v. Bank, 2 Pet., 96.

The facts in the case at bar are somewhat similar to those of *Ittner's* case in the Court of Claims. There the claimant agreed in writing with the Government on April 4, 1903, to erect a hospital building at Chickamauga Park, Georgia. The contract provided that work should commence on or before April 6, 1903, and should be carried forward with reasonable dispatch and be completed on or before January 1, 1904. The contract was by its terms subject to the approval of the Quartermaster-General of the Army, and was not approved by him until April 23, 1903, twenty-two days after the claimant had obligated himself to begin the work. It contained a provision for liquidated damages at \$20 a day for each and every day the work might remain uncompleted after the date fixed for completion, January 1, 1904. Before the expiration of the period within which to perform his part of the contract the contractor applied to the Quartermaster-General to waive the time limit. The Quartermaster-General did so. The

building was completed and accepted by the Government on August 31, 1904, and the balance due the contractor was paid without any deduction.

Thereafter a question was raised by the auditor for the War Department in the settlement of the accounts of the officer who made the payments as to whether there should not have been deducted from the contract price the amount of liquidated damages, \$4,860.

Thereupon the officer requested the contractor to return the amount, \$4,860, which was done upon the understanding that it was for the protection of the officer and should not prejudice the contractor's rights. It was held by the Court of Claims that the claimant recover. The case turned largely, it is true, upon the fact that the Quartermaster-General did not approve the contract until after the time for the beginning of the work by the contractor. It is impossible to read the case, however, without being impressed with the conviction that even had this element not been in the case, the judgment would have been the same.

Ittner v. U. S., 43 C. Cl., 336.

II

The waiver of the time limit in the first contract necessarily tolls the provision in that contract for liquidated damages.

Nothing is clearer in the law than that there must be a definite time from which the liquidated damages begin to run and also a definite time at which they cease. Necessarily, if the time from which the liquidated damages are to run be eliminated from the contract, then no liquidated damages can run from that date.

There are many cases in the books where the waiver of the time limit or the extension of the time in which to complete have been by implication, but the case here is much stronger because here we have the actual deliberate waiver of the Government. As the contract now stands, it is just as if it had been drawn without any time whatever from which liquidated damages were to run. There being no definite time from which liquidated damages are to run, it must follow as a logical necessity that the liquidated damages can not be assessed. That the Government recognized this is abundantly shown by the fact that when the vessel was accepted the entire contract price was paid therefor, even including the 10 per cent which the Government held for 60 days to make good any defects in the material or workmanship.

Kemp v. Rose, 1 Giff., 258.

Dodd v. Churton, 1 Q. B., 562.

"When the stipulation as to the time has been waived, it is eliminated from the contract and therefore relieves the contractor from stipulated liquidated damages for non-completion within the time specified. The waiver established, the contractor may then have an action for the contract price, including the percentage retained as liquidated damages for non-performance within the stated time, and the owner must show any injury he has suffered if he will retain damages out of what is due the contractor or recoup them from what he has paid."

Wait's Engineering and Architectural Jurisprudence, Sec. 726, pages 667, 668.

Flynn v. Des Moines R. R. Co., 63 Iowa, 491.

Phillips v. Seymour, 91 U. S., 646.

In the opinion of the court below it is conceded, citing *District of Columbia v. Camden Iron Works*, *Williams v. Bank*, *supra*, the *United Engineering and Contracting Company* case, 47 C. Cls., 489, lately affirmed by this Court, No. 381, October Term, 1913, *Mosler Safe Co. v. Maiden Lane S. D. Co.*, 199 New York, 479, 489, and cases therein cited, that where the waiver of the time limit is due to the delay of the Government the effect of such waiver is to eliminate the time limit from the contract and also to waive the provision for liquidated damages. If this is true in the case of an implied waiver, *a fortiori*, it is true in the case of an actual waiver. We submit, however, that the real question is whether there is or is not a waiver, and not its form, or how it may have been caused.

III

Aside from the express waiver of the time limit by the Quartermaster-General, the fact of payment in full of the entire balance due under the first contract was an accord and satisfaction and conclusive on the Government and a waiver of any claims against the claimant under that contract.

U. S. v. Corliss Steam Engine Co., 91 U. S., 321.

Same v. Same, 10 C. Cl., 494.

Shipman v. U. S., 18 C. Cl., 138.

I Hudson on Building Contracts, 538.

Wait, *supra*, see, 325, pp. 269, 270, and cases there cited.

IV

The payment of the entire contract price under the first contract, without any deduction, was deliberate and under no mistake.

The answer and plea of setoff aver that the payment of the whole sum under the first contract was made under a mistake of fact. Inasmuch as the facts constituting the mistake or the facts upon which the mental attitude of mistake may be based are not set out, just what this defense means is not clear. The burden of proof is on the defendant to show what the mistake was. As a matter of fact, not only is there no evidence of any mistake on the part of the Government, but the facts show great deliberation in its conduct. The Quartermaster-General waives the time limit and subsequently confirms it in writing. He advises the depot quartermaster to make the final payments, and the money is paid. How can it be said that there is a mistake of fact here?

To authorize relief on the ground of mistake, the mistake must have arisen from ignorance, imposition or misplaced confidence. An act done intentionally and with knowledge can not be treated as a mistake.

Griffith v. U. S., 22 C. Cl., 165.

There was no mistake of fact. If there was any mistake, it was a mistake of judgment, which can not be reviewed here.

In the opinion of the court below it seems to be assumed that the payment was made under a mistake of law, and cites the case of *Barnes v. District of Columbia* in which it was distinctly held that "money paid can be recovered back when paid in mistake of *fact* but not of *law*."

Barnes v. D. C., 22 C. Cl., 366, 394.

There is absolutely nothing in the record to show mistake of any kind in the payment. In the fifth finding of fact the Court finds that the Government sets up by way of counterclaim the sum of \$4,750 which it *claims* was due as liquidated damages for the 95 days' delay of the claimant in the execution of the first contract hereinbefore referred to, which sum it is claimed was inadvertently, improperly and illegally paid by the officers of the Government to the claimant and the defendant asks that if any amount is recovered by the claimant under said second contract the amount of said sum should be set off against the same.

This finding merely states the *claim* of the Government, as to which there was absolutely no evidence.

The word "illegally" rather suggests that some effort may be made here to show that the Quartermaster-General was without authority to direct this payment to be made. As to that we presume it sufficient to call the attention of the Court to the fact that the contract under which this deduction is sought to be made for liquidated damages was made with the Quartermaster-General's Department of the Army.

The contract was subject to the approval of the Quartermaster-General and was by him approved. Indeed, he was the only officer who could waive the time limit or extend the time. This is the general practice of the Government, and the right is reserved in the contracts.

In the case of *Salomon v. U. S.*, *supra*, the contract was made with the Quartermaster-General's Department. The acceptance was by the Chief Quartermaster's clerk and the Chief Quartermaster gave to Salomon the usual voucher for the sum due.

In the case of *Ford v. U. S.*, *supra*, time specified for the completion of the work was extended by the Chief of Engineers, the contract in that case being made with his Department. So, in the case of *Ittner v. U. S.*, *supra*, which involved a contract with the Quartermaster-General's Department, as in the case at bar, the contract had to be approved by him. The Quartermaster, there as here, waived the time limit. The work required by the contract was completed and accepted by the Government and the contractor was paid in full. So, in the case of the contract for the suction dredge, the contract here sued on, that being made with the Engineers' Department, the Chief of Engineers would be the proper one to extend or waive the time of performance.

In these cases as in the case at bar, the waivers were made, of course, before any liquidated damages had accrued, so that no right of the Government was relinquished.

There was no loss or damage suffered by the Government in completing and delivering the steamer under the first contract.

The burden is on the Government to show ~~the amount of the~~ loss or damage sustained by reason of the delay in completing and delivering the steamer, and there is not a scintilla of evidence, even remotely tending to establish such loss or damage. The finding of the Court of Claims on this point is: "It is not shown that the United States suffered any actual pecuniary loss or damage by reason of the delay of the claimants in the completion and delivery of the steamer." Finding VI.

On this point we desire respectfully to call the attention of the Court to the form of the contract under which it is sought to deduct the amount herein involved as liquidated damages. In the answer of the defendants this portion of that contract is set out verbatim. Article 2. "That the Maryland Steel Company shall complete the construction and equipment of said steamer and deliver the same to the party of the first part in New York harbor, or as directed by him, in one hundred and forty (140) days, exclusive of Sundays and holidays, from the date of this contract. And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, *the loss resulting to the United States from such failure is hereby fixed at the rate of fifty (\$50)*

dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the steamer is delayed beyond the period hereinbefore specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract.” (R., 81-82.)

The language of the contract is that the loss resulting to the United States shall be compensated for at a certain rate. The contract does not contain an agreement, however, that there shall be a loss. The parties do not admit that mere delay must necessarily involve loss. This contract is quite different from that of the suction dredge, in which the language is, “* * * time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part *will be damaged thereby*, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated and fixed in advance * * *” (R., 6.)

The essential difference between the two contracts is that in the case of suction dredge the parties themselves agree in advance that mere delay *shall involve a loss*, while on the other hand the contract for the building of the steamer the language is, “the loss re-

sulting to the United States," that is, loss, if any, by reason of delay shall be compensated as provided. The burden of proof under the contract for the steamer is clearly on the Government to show that there was some loss sustained to which the scale of compensation might be applied. It is not, of course, to be pretended that the amount of loss shall be shown, for that is covered by the contractual provision, but it is absolutely necessary that some loss shall be affirmatively shown in order to apply the agreed compensation thereto. A case on this very point was *Hathaway v. Lynn*. There the plaintiff was the proprietor of a hotel and an omnibus line for the carriage of passengers between the hotel and the cities of Grand Rapids and Centralia. The cities are separated by the Wisconsin River and were at that time connected by a free bridge across the river. At the time the defendant was engaged in the business of operating omnibuses in those cities. The plaintiff sold his omnibus outfit to the defendant who paid the consideration therefor. The defendant then agreed to run a separate omnibus between the hotel and the railroad stations in the two cities, and the plaintiff agreed that so long as the contract was carried out not to put an omnibus line in those cities. In case of the violation of the agreement by either party the damages recoverable by the other party were fixed by the contract.

The action was brought to recover the damages so fixed as liquidated damages for breach of the contract, the defendant having failed to operate the om-

nibuses as provided. The defendant alleged full performance of the contract, except when he had been prevented by the destruction of the bridge between the two cities. He also set up that the plaintiff had released him from the agreement. Verdict and judgment for the defendant. The plaintiff appealed to the Supreme Court of Wisconsin. Said that Court:

"This action is brought upon the theory that the sum of \$200 specified in the agreement is liquidated damages for any breach of the requirements thereof, and such is the contention of the plaintiff. For the purpose of the case the correctness of this proposition will be conceded. In such a case before any liability to pay the liquidated damages can attach to the party in default, he must have been guilty of a substantial breach of his agreement—a breach which has resulted in something more than mere nominal damages to the other contracting party. This rule is so manifestly just that no discussion of it is necessary. Hence, we conclude that the plaintiff is not entitled to recover such stipulated damages for any alleged breach occurring before the time the defendant claims to have been released by the plaintiff from the obligations of the agreement."

Hathaway v. Lynn, 75 Wis., 186.

Before liability to pay liquidated damages can attach the party at fault must have been guilty of a substantial breach of his agreement, which has resulted in something more than mere nominal damages, that is actual loss to the other party.

Werner v. Finley, 129 S. W. (Mo.), 73.

There are cases which appear to establish a different rule, but an examination of those cases will show that they really are in harmony with the rule above cited. Take for instance an action on a bond. There it is, of course, not necessary to prove actual loss because of the nature of the contract. The agreement to pay the obligee the penalty is a primary contract. The obligor must pay the penalty unless the condition be performed. In other words, in those cases there is the very admission which is made in a contract where the parties agree that there shall be a loss by reason of delay.

The fundamental principle of the doctrine of damages is compensation. The loss to be compensated must be established in some way, either by the agreement of the parties or by proof. If there is no loss or damage sustained then the so-called liquidated damages are mere penalties.

VI.

In conclusion we respectfully submit that the judgment appealed from should be reversed and the cause remanded with directions to enter judgment for the claimant for the full amount claimed in the petition.

ALEXANDER PRESTON,
WALTER D. DAVIDGE,
Attorneys for Appellant.

14

Office Supreme Court, U. S.

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IN THE
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OCTOBER TERM, 1914.

No. 104.

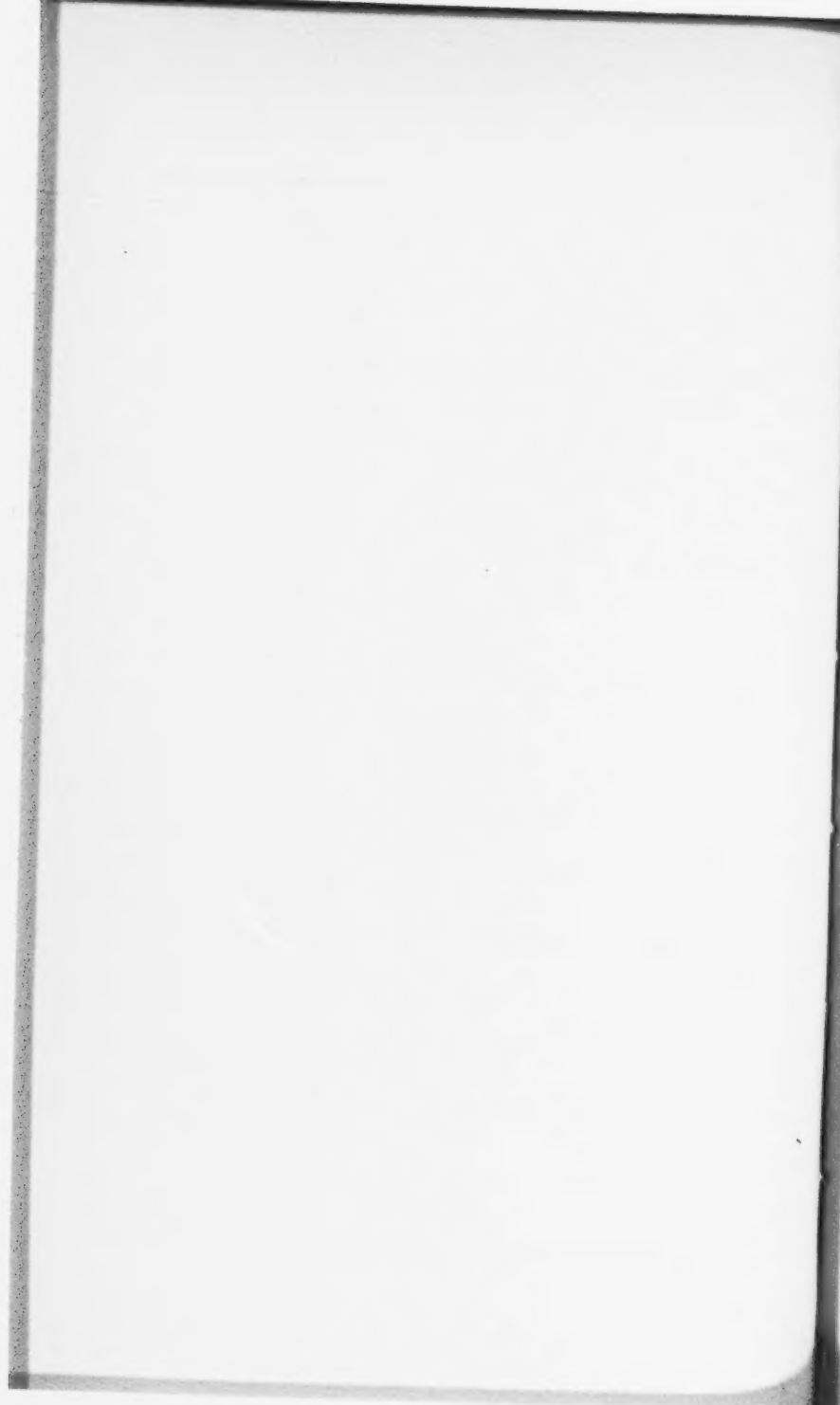
MARYLAND STEEL COMPANY OF BALTIMORE COUNTY,
Appellant,

v.

THE UNITED STATES.

REPLY BRIEF OF APPELLANT.

ALEXANDER PRESTON,
WALTER D. DAVIDGE,
Attorneys for Appellant.



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MARYLAND STEEL COMPANY OF BALTIMORE COUNTY,
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THE UNITED STATES.

REPLY BRIEF OF APPELLANT.

We desire to call the attention of the Court to the decisions cited by the appellees. Their brief is divided into three points, and we shall follow that arrangement.

I

The first point is that where a contract provides for the payment of liquidated damages, the same be-

come chargeable without a showing of actual damages suffered. This may or may not be true, depending entirely upon the form of the contract in which the liquidated damages are provided.

The appellees cite in support of this proposition, one case, *United States v. Bethlehem Steel Company*, 205 U. S., 105, which in turn cites the case of the *Sun Printing & Publishing Association v. Moore*, 183 U. S., 642. In the case of the *Bethlehem Steel Company*, the contract was peculiar. The facts are more fully set out in the report of the Court of Claims (41 C. Cl., 19) than in the report of this Court. In March, 1898, just before the Spanish-American war, and in anticipation thereof, the Government, through the War Department, advertised for sealed proposals for the construction of six disappearing gun carriages for 12-inch breech-loading rifles; the specifications accompanying the advertisement set forth the character and extent of the work to be done. The *Bethlehem Steel Company*, in consequence of a letter written the company by the Chief of Ordnance, in which he suggested that bids be submitted for rapid delivery of a certain number of carriages, and for less rapid delivery, made four proposals, as follows:

1st—To furnish 5 or more such carriages for \$31,000.00 each, and to deliver the first carriage within six months, to be followed by two carriages every three months thereafter.

2nd—To furnish the same number for \$33,000.00 each, and to deliver the first carriage within five months, to be followed at the rate of one carriage every month.

3rd—To furnish the same number for \$35,000.00 each, delivering the first carriage within four months, the second within five months, and the remainder to follow at the rate of three carriages every two months.

4th—To furnish the same number for \$36,000.00 each, delivering the first carriage within four months, the second within five months, and the remainder to follow at the rate of two carriages every month.

The Government accepted the 4th proposal, which was slightly modified but not so as to affect the question we are considering. The Ordnance Department sent the company a contract for execution. The company noted that the penalty in the proposed contract was \$75.00 for every day's delay in furnishing each carriage, whereas \$10.00 had been stipulated in the instructions to bidders. The Chief of Ordnance thereupon replied that the sum of \$75.00 was "the average difference in time of delivery between your [the company's] price recently bid for slow delivery of these carriages and the price under the accepted bid." Thereafter it was found that an error had been made in the above computation in that the \$75.00 provided for should have been \$35.00. The contract, with this correction, was then signed. It is, of course, perfectly obvious that the value of the gun carriages remained a constant factor. The Government, however, was to pay a larger sum for a quick delivery than for a slow delivery. At that time war was impending, and was shortly afterwards declared. The provisions for liquidated damages, however, as stated by the Chief of Ordnance, in the let-

ter to the Steel Company, amounted to computing the gain or loss to the Government, by rapid or slow deliveries, as the case might be, in the form of liquidated damages. In accepting the 4th proposal, what the Government really did was to say to the Steel Company, "we shall pay you \$36,000.00 apiece for the carriages if delivered, the first within four months, the second within five months, and the remainder at the rate of two carriages every month." In other words, we shall pay a series of bonuses for quick delivery.

There was considerable delay in furnishing the carriages, and the Government withheld the stipulated damages. Under these circumstances this Court sustained the Government. The whole case turned upon the proposition that the Government was paying so much additional money to the Steel Company, not merely for gun carriages, which might have been purchased at a reduced figure, but for the purpose of securing early delivery, and inasmuch as that part of the contract had not been performed, the Steel Company had not earned the stipulated amount which was to be paid to it in consideration of early delivery. In other words, the Steel Company was to earn a bonus, to put the proposition in a more usual form, and by reason of its delay it failed to earn the bonus, and, therefore, the Government refused to pay it. This is precisely the ground taken by the Attorney-General in his brief in that case.

The opinion of the Court, reversing the Court of Claims, speaks of the courts being "strongly in-

clined to allow the parties to make their own contracts and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained."

Unquestionably, the parties in the case at bar might have made another agreement, a contract such as, for instance, they did make in the case of the suction dredge, which would have provided for liquidated damages, and which might have been carried into effect, but they did not do that. The vital distinction between the contracts of the Bethlehem Steel Company and of the Maryland Steel Company for the suction dredge, on the one hand, and the contract of the Maryland Steel Company for the construction of the steamer on the other, results from the contracts which the parties themselves have made. In the case of the steamer they might have made another contract, but they did not do it.

The Bethlehem Steel Company case cites the *Sun Printing & Publishing Association v. Moore, supra*, a case which illustrates the very rule for which we are contending. In that case a yacht, the property of Moore, was let by a charter party to the Sun Printing & Publishing Association, for a definite period, at the end of which she was to be returned. The vessel was wrecked and became a total loss. It was agreed that for the purpose of the charter that the value of the yacht should be considered and taken at \$75,000.00, and that the hirer should procure security to the owner to that amount. The loss was

admitted. The case was as to the quantum of damages, whether the agreed valuation should be applied, or, as contended by the Sun Printing & Publishing Association, the actual value of the vessel. The court applied the valuation of the yacht as agreed by the parties. In that case the very cause of action arose from the failure of the hirer to return the yacht to the owner within the time stipulated. The loss, which was the damage to which the agreed scale of compensation was to be applied, was admitted.

II

The second point of the appellee's brief is to the effect that the waiver of the time limit for the performance of the contract did not destroy the right to liquidated damages. Nothing is set out as to how it is possible to assess liquidated damages without a definite starting point. The brief then goes on to cite eight cases, not one of which is a case in any way involving the doctrine of liquidated damages. They are all cases where actual damages are the causes of action.

We do not mean to say, of course, where the stipulation as to time has been waived and has been eliminated from the contract, or where a contract is drawn which makes no provision at all for liquidated damages, that in these cases the parties charged with the construction may unreasonably delay the work to such an extent as to damage the other party to the contract and not be liable for actual damages. But

we do say just what this Court said in the case of *Phillips v. Seymour*, 91 U. S., 646; that in such a case there may be a recovery for actual damages, or the party may wait to be sued and recoup the damages thus sustained, in reduction of the contract sum for the completion of the work. The waiver of the time limit left the contract without any time limit, but it was none the less to be performed **within a reasonable time**, and if not so performed, any damages which the other party might have sustained by reason of the delay might be the basis of an action for damages.

We have carefully examined every case cited by the appellees under this point, and in not one of them in any way did the contract provide for liquidated damages. In the case of the *Phillips v. Seymour*, *supra*, there was a provision that a certain amount of money might be withheld to meet any damages which the other party might sustain, but there was no provision for the amount of those damages, no liquidated or stipulated damages.

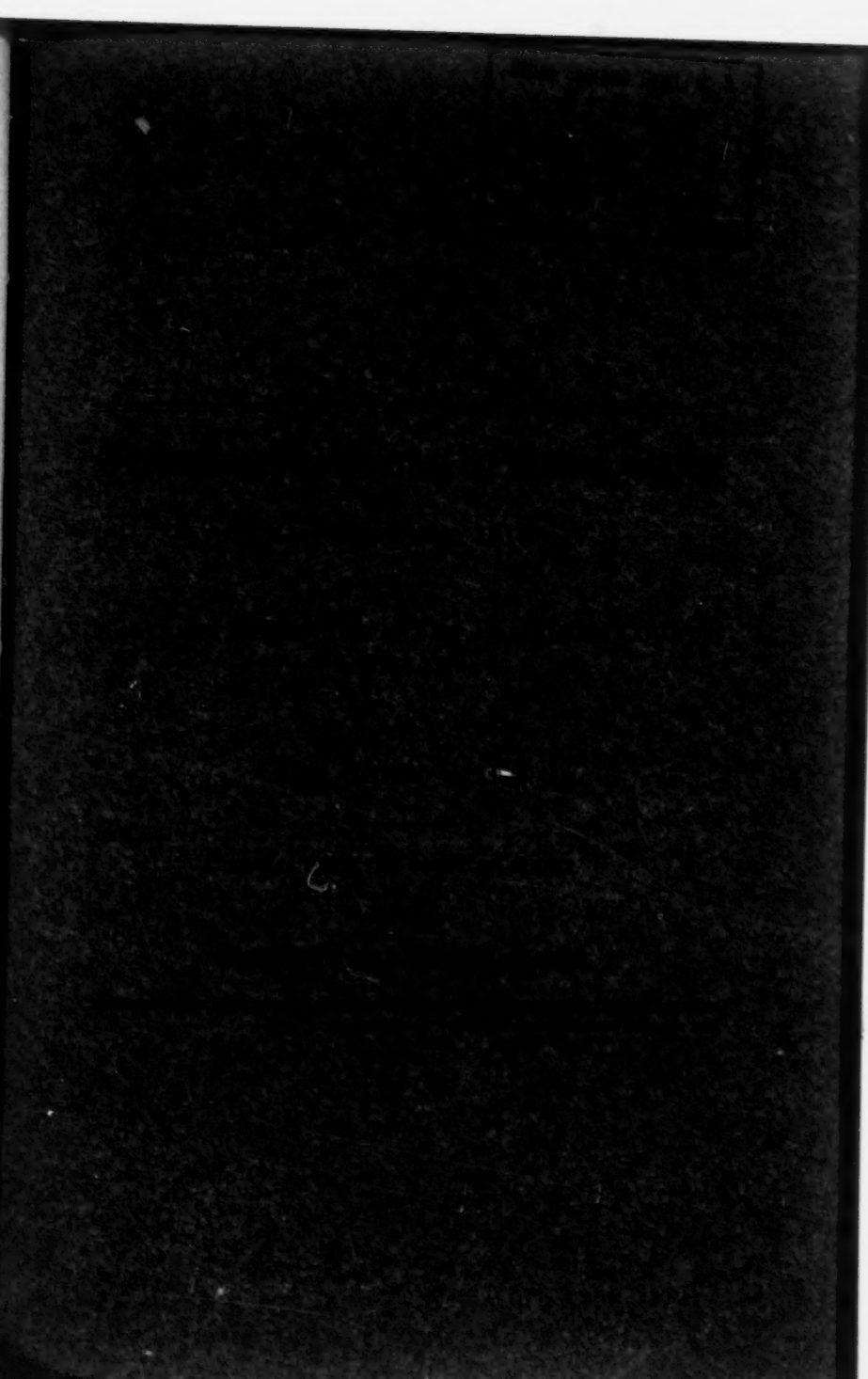
III

The appellees concede that the Quartermaster-General had the right to make the contract and the waiver and to accept the steamer when completed, but they say the payment under the contract was illegal or under a mistake. They nowhere set out, however, in what the payment was unlawful or mistaken. They admit that he had a right to make the contract as modified by the waiver and to take the

benefits thereunder, but they deny that he could discharge the correlative obligation.

Respectfully submitted,

ALEXANDER PRESTON,
WALTER D. DAVIDGE,
Attorneys for Appellant.



In the Supreme Court of the United States.

OCTOBER TERM, 1914.

MARYLAND STEEL COMPANY OF BALTI-
more county, appellant,
v.
THE UNITED STATES.

No. 104.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal on the part of the Maryland Steel Company from a judgment rendered by the Court of Claims in favor of the Government.

On June 24, 1903, appellant entered into a contract with the Government to construct a single-screw steamer at a cost of \$88,000, to be completed on December 9, 1903. The terms of the contract provided that if the appellant should fail to complete and deliver said steamer within the stipulated time it should pay the United States the sum of \$50

per day as liquidated damages for each and every day so delayed, exclusive of Sundays and legal holidays, which amount might be withheld from any money due appellant under said contract.

On December 1, 1903, or nine days before the stipulated time of completion, the ~~depot~~ quartermaster, United States Army, at the request of appellant, orally waived the time limit for constructing and equipping said steamer, and subsequently confirmed said waiver by letter of April 2, 1904. The steamer was completed, delivered, and accepted by the United States on April 1, 1904, and on July 13, 1904, the balance in full of moneys retained to cover defects in material and workmanship was paid to appellant.

On February 24, 1908, appellant entered into another contract with the Government, whereby the former agreed to construct a twin-screw suction dredge at the contract price of \$357,500, and the same was delivered to and accepted by the United States on January 6, 1909. Appellant was paid the stipulated contract price, less \$4,750, which the Government claimed as liquidated damages accruing from the 95 days' delay of appellant in the first contract hereinbefore referred to, for which amount appellant brings this action.

The Government pleaded (Rec., 81) a set-off by way of counterclaim in the said sum of \$4,750 claimed as liquidated damages for the 95 days' delay growing out of the first contract, which it

claimed was inadvertently and by mistake paid by the officers of the United States Government.

Appellant contends that the waiver of the stipulated time limit under the terms of the contract had the effect of waiving the rights of the Government to liquidated damages. Appellant further contends that the payment in full of the contract price under the first contract was an accord and satisfaction and conclusive on the Government, and the waiver of any claims against the claimant under the contract; that there was no mistake of fact on the part of the depot quartermaster in making the payments; that the burden is on the Government to show some loss or damage, and that there having been no loss or damage suffered, the Government had no right to withhold the sum claimed for liquidated damages.

The Government, on the other hand, maintains that the waiver of the time limit for completion, having been granted because of the admitted inability of appellant to complete the contract within the stipulated time, and at the request of appellant (Rec., p. 89), did not destroy the effect of the liquidated damage clause (article 2, Rec., p. 86); that where the contract provides for liquidated damages it is not necessary to prove actual loss or damage sustained; that the Government is not bound by the acts of its officers in making unauthorized payments inadvertently or by mistake.

ARGUMENT.

The Government presents its argument under the following heads:

First. Where the contract provides for the payment of liquidated damages the same become chargeable without a showing of actual damage suffered.

Second. The waiver of the stipulated time limit for the performance of the contract did not destroy the right to liquidated damages.

Third. The Government is not bound by the acts of its officers in making unauthorized payments.

I.

Where the contract provides for the payment of liquidated damages the same become chargeable without a showing of actual damage suffered.

Article 2 of the liquidated damage clause is as follows:

That the Maryland Steel Company shall complete the construction and equipment of the said steamer and deliver same to the party of the first part in New York Harbor, or as directed by him, in one hundred forty (140) days, exclusive of Sundays and legal holidays, from the date of this contract. *And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, the loss resulting to the United States from such failure is*

hereby fixed at the rate of fifty (\$50) dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the vessel is delayed beyond the period hereinbefore specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract.

In the event of the act of God, war, fire, or strikes and lockouts of workmen affecting the working of this contract, the date of completion of the steamer may be extended for such periods as may be deemed just and reasonable by the party of the first part, to cover the time lost from any of the above-mentioned causes.

This court has held that where there is no fraud or other illegality to vitiate the agreement, the terms of the contract for liquidated damages remain in force, regardless of whether there has been any actual loss or damage occasioned by the delay.

In the case of *United States v. Bethlehem Steel Company* (205 U. S., 105, 119) the court said:

The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could

be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts and to carry out their intentions even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. This whole subject is reviewed in *Sun Printing & Publishing Association v. Moore*, 183 U. S., 642, 669, where a large number of authorities upon this subject are referred to.

It is assumed and declared by the appellant that there were no damages suffered by the Government because of the delay. Aside from the fact that it is not incumbent upon the Government to prove a loss, nevertheless it is not shown that loss did not actually occur. The language of finding 6 (Rec., 85) regarding it is as follows:

It is not shown that the United States suffered any actual pecuniary loss or damage by reason of the delay of the claimant in the completion and delivery of the steamer.

The Government did not attempt to show loss. Under the authorities such showing is not necessary. However, it is a fair presumption that the loss of the use of the vessel for 95 days was a serious damage, though not susceptible of ascertainment in dollars and cents.

II.

The waiver of the stipulated time limit for the performance of the contract did not destroy the right to liquidated damages.

Appellant contends that the extension of the time limit waived the liquidated damages agreed upon because there was then no fixed date from which liquidated damages could commence or cease to accrue.

The Government maintains that the waiving of the time limit simply estopped the Government from annulling the contract, but that this in no way affected the other terms of the contract.

In the case of *Phillips v. Seymour* (91 U. S., 646, 651) the court said:

If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor can not recover on the covenant, because he can not make or prove the necessary allegation of performance on his own part. What remedy he may have in assumpsit for work and labor done, materials furnished, &c., we need not inquire here; but if the other party

says to him, "I prefer you should finish your work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed.

For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to perform within time; or, if he wait to be sued, he may recoup the damages thus sustained in reduction of the sum due by contract price for the completed work.

In the case of *McGowan v. American Pressed Tan Bark Company* (121 U. S., 575, 600, 601) the facts show that the defendants were to erect machinery on plaintiff's steamboat in 60 days from the date of the contract. The plaintiff failed to finish the steamboat until after the expiration of the 60 days. The defendants then went to work to put in the machinery, but failed to complete their work within 60 days after taking possession of the boat. It was held they were bound to do their work within 60 days from the time the boat was finished and that the waiver of the time limit for completion did not waive the right of the plaintiff to recover damages for the delay on the part of the defendants who failed to complete within 60 days after the completion of the boat. Mr. Justice Blatchford, writing the opinion, said, on page 600:

It is, therefore, claimed by the plaintiff that no damages were included in the verdict

on account of the delay in not erecting the machinery within sixty days from June 23, 1881. This appears to be a sound proposition. We see no error in the charge of the court that if the defendants proceeded under the contract they were bound to complete the work within the length of time contemplated by the original agreement and such additional time as was lost by the delay in the construction of the boat. There is nothing in the bill of exceptions to show that the machinery could not have been erected within sixty days after the boat was ready to receive it. The parties treated the contract as in full force, except as to the time in which it was to be performed, and the work was done and the payments were made under the contract as thus extended in time. The defendants made no claim before the suit was brought that the contract was rescinded by reason of the nonreadiness of the boat until the 10th of November, 1881, or that there was any reason in that fact which prevented them from complying with their part of the contract within the sixty days after the delivery of the boat. No such defense is set up by them in their answer, and they introduced no evidence to that effect, so far as the bill of exceptions shows. These views are in accordance with the ruling of this court in *Phillips Co. v. Seymour*, 91 U. S., 646. The plaintiff went on paying the defendants on account for the machinery, and the defendants proceeded in erecting it without com-

plaining of the delay in the furnishing of the boat, and without any claim that they were not required to furnish the machinery within the sixty days after the furnishing of the boat. See also *Graveson v. Tobey*, 75 Ill., 450.

See, also, *United States v. McMullen* (222 U. S., 460, 468-471).

In the case of *Nibbe v. Brauhn* (24 Ill., 268, 270) it was held that—

A precise time, then, is shown, within which the contract was to be completed. That parties, while work is in progress, may extend the time for its completion, can not be questioned. Owing to the alterations demanded by appellant, further time became necessary for the completion of the building, and it was extended by agreement, to the first day of September, 1857, at which time it was completed and accepted by the appellant, and, therefore, the contract was as fully performed as though it had been finished on the first day of June. We would hold, that appellant having permitted the contractors to proceed on the work after the first day of June, and accepting the work at a future day has waived the performance on the day fixed, and that a mere extension of time of performance does away with none of the stipulations—an agreement to extend the time waives nothing more than the time of performance.

In the case of *Redlands Orange Growers' Association v. Gorman* (54 L. R. A., 718, 721; 161 Mo., 203) the court said:

The position of the appellant is that, when goods are delivered out of time, and the vendee accepts them without protest, he thereby waives his right to damages resulting from the breach of the contract, except where the goods are accepted of necessity; that is, where the surrounding circumstances are such as to make it necessary for him to accept in order to avoid the accumulation of much greater damage. We can not accede to this view of the law. We believe the law to be that, where time is made the essence of the contract, delay beyond the stipulated time in the shipment or delivery of goods does not preclude the vendee from accepting them. If he does so, and is damaged on account of the delay, and he has paid the purchase money, he may bring this action, and recover his damage. If he has not so paid, he may recoup his damage when sued for the purchase price.

In the case of *Fisk v. Tank* (12 Wis., 306, 78 Am. Dec., 737) the court said:

We were at first in doubt whether the plaintiff's claim for board and wages of seamen should not be confined to such time as was lost after the machinery was delivered and up to and including a reasonable time for supplying other, on the ground of his right, upon the failure of the defendants to furnish it on the 1st of August, to consider

the contract at an end and to proceed to supply himself elsewhere, and because his waiver of performance as to time might be considered an abandonment of any claim for damages on that account. But on further consideration we are satisfied this would be wrong. A waiver in such cases is made for the benefit of the party in default, and as against him should be construed strictly and liberally in favor of the party making it. It is supposed to be granted at the request of the party indulged, and should be confined to the precise right waived (which in this case was the right to refuse the machinery after the day) and should not be extended to collateral matters. In this case there can be little doubt that the plaintiff was deterred from making exertions to procure other machinery by the conduct and assurances of the defendant Verbeck, that that contracted for would be speedily completed.

See also *Jeffrey Mfg. Co. v. Central Coal & Iron Co.*, 93 Fed., 408, 412.

The cases most relied upon by appellant (in the court below) have been reviewed and distinguished by the court in its opinion. (Rec., pp. 88-89.)

III.

The Government is not bound by the acts of its officers in making unauthorized payments.

This court has so repeatedly held that the Government is not bound by the acts of its officers in making unauthorized payments through mistake of

facts or of law that we do not deem it necessary to do more than call attention to the doctrine laid down in the following cases:

Wisconsin Central Railroad Co. v. United States, 164 U. S., 190, 212.

Logan Company v. United States, 169 U. S., 259.

United States v. Saunders, 79 Fed., 408.

United States v. Utz, 80 Fed., 852.

Respectfully submitted,

HUSTON THOMPSON,
Assistant Attorney General.



MARYLAND STEEL COMPANY OF BALTIMORE
COUNTY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 104. Argued December 8, 1914.—Decided January 5, 1915.

Although parties to a contract may agree that time is of the essence and may stipulate for liquidated damages, they may subsequently so modify the requirements as to completion that performance within the stipulated time becomes unimportant. *Flynn v. Des Moines Railway*, 63 Iowa, 490, approved.

As the record in this case does not show that there was any culpable delinquency in completion of a contract for the building of a vessel, or any detriment to the Government, but that the vessel was delivered, tested, approved and paid for without protest on the part of the Government on account of delay, and, as it does appear, the Quartermaster General had, in his discretion, orally waived the time limit in the contract, *held*, that:

In a case of contract authorized by law necessarily entered into and conducted by officers of the Government, they must necessarily have the power to make it effective in its progress as well as in its beginning; and the oral agreement of the Quartermaster General was within the scope of his official authority and amounted to a modification of the contract. *Salomon v. United States*, 19 Wall. 17, followed. *United States v. Bethlehem Steel Co.*, 205 U. S. 105, distinguished.

48 Ct. Cls. 50, reversed.

THE facts, which involve the right of the Government to deduct from final payment on a contract an amount

alleged to be due as liquidated damages for non-completion on a former contract with the claimant, and also the question of whether such liquidated damages had been waived by the Government, are stated in the opinion.

Mr. Walter D. Davidge, with whom *Mr. Alexander Preston* was on the brief, for appellant:

Within the time limited for the completion and delivery of the steamer under the first contract the Government waived the time limit. *Salomon v. United States*, 19 Wall. 17; *Ford v. United States*, 17 Ct. Cl. 60; *District of Columbia v. Camden Iron Works*, 181 U. S. 453; *Phillips Const. Co. v. Seymour*, 91 U. S. 646; *Williams v. Bank*, 2 Pet. 96; *Ittner v. United States*, 43 Ct. Cl. 336.

The waiver of the time limit in the first contract necessarily tolls the provision in that contract for liquidated damages. *Kemp v. Rose*, 1 Giff. 258; *Dodd v. Churton*, 1 Q. B. 562; *Wait's Engineering Jurisprudence*, § 726, p. 667; *Flynn v. Des Moines R. R.*, 63 Iowa, 491; *Phillips v. Seymour*, 91 U. S. 646; *Mosler Safe Co. v. Maiden Lane S. D. Co.*, 199 N. Y. 479, 489.

Aside from the express waiver of the time limit by the Quartermaster General, the fact of payment in full of the entire balance due under the first contract was an accord and satisfaction and conclusive on the Government and a waiver of any claims against the claimant under that contract. *United States v. Corliss Steam Engine Co.*, 10 Ct. Cl. 494; *S. C.*, 91 U. S. 321; *Shipman v. United States*, 18 Ct. Cl. 138; 1 *Hudson on Building Contracts*, 538; *Wait, supra*, § 325.

The payment of the entire contract price under the first contract, without any deduction, was deliberate and under no mistake. *Cases supra* and *Griffith v. United States*, 22 Ct. Cl. 165; *Barnes v. District of Columbia*, 22 Ct. Cl. 366, 394.

There was no loss or damage suffered by the Govern-

235 U. S.

Opinion of the Court.

ment in completing and delivering the steamer under the first contract.

United States v. Bethlehem Steel Co., 205 U. S. 105; *Sun Printing Ass'n v. Moore*, 183 U. S. 642, do not apply to this case.

Mr. Assistant Attorney General Thompson for the United States:

Where the contract provides for the payment of liquidated damages the same become chargeable without a showing of actual damage suffered. *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 119.

The waiver of the stipulated time limit for the performance of the contract did not destroy the right to liquidated damages. *Phillips v. Seymour*, 91 U. S. 646, 651; *McGowan v. Am. Pressed Bark Co.*, 121 U. S. 575, 600. See also *Graveson v. Tobey*, 75 Illinois, 450; *United States v. McMullen*, 222 U. S. 460, 468; *Nibbe v. Brauhn*, 24 Illinois, 268; *Redlands Association v. Gorman*, 161 Missouri, 203; *Fisk v. Tank*, 12 Wisconsin, 306; *Jeffrey Mfg. Co. v. Central Coal Co.*, 93 Fed. Rep. 408, 412; *Wisconsin Cent. R. R. v. United States*, 164 U. S. 190, 212; *Logan Co. v. United States*, 169 U. S. 259; *United States v. Saunders*, 79 Fed. Rep. 408; *United States v. Utz*, 80 Fed. Rep. 852.

MR. JUSTICE McKENNA delivered the opinion of the court.

Petition in the Court of Claims for judgment for the sum of \$4,750.00, balance due upon a contract entered into between petitioner in such court, appellant here, and the United States for the construction of a steel hull twin-screw suction dredge and for installing therein the propelling and other machinery.

There was and is no controversy as to the performance

of the contract or as to the amount due upon it. The Government set up as an offset an amount alleged to have been illegally paid on a prior contract between appellant and the Government, which contract, according to the findings of the Court of Claims, (all the facts which we state being the findings of the Court of Claims) was entered into between appellant and the Government on June 24, 1903, for the construction and equipment of a single screw steamer for harbor service of the Quartermaster's Department and submarine cable service, according to certain specifications which were made part of the contract, for a consideration of \$88,000.00, to be paid in various amounts as the work progressed, less 10% to be withheld to make good any defects, the vessel to be completed within one hundred and forty days, exclusive of Sundays and legal holidays, or by December 9, 1903.

It was provided that if appellant should "fail to complete and deliver the steamer within the stipulated time it should pay to the United States the sum of \$50.00 per day as liquidated damages for each and every day so delayed, exclusive of Sundays and legal holidays, which amount, it was provided, might be withheld from any money due" appellant under the contract.¹

¹ "That the Maryland Steel Company shall complete the construction and equipment of the said steamer and deliver same to the party of the first part in New York Harbor, or as directed by him, in one hundred and forty (140) days, exclusive of Sundays and legal holidays, from the date of this contract. And it is hereby agreed that in case the party of the second part fails to complete in all respects and deliver the said steamer within the time herein specified, the loss resulting to the United States from such failure is hereby fixed at the rate of fifty (\$50) dollars per day for each and every day, exclusive of Sundays and legal holidays, completion and delivery of the vessel is delayed beyond the period hereinbefore specified, and it is hereby stipulated that the party of the first part may withhold such amount as liquidated damages from any money due and payable to the party of the second part by the United States for work done under this contract. In the event of

235 U. S.

Opinion of the Court.

On December 1, 1903, before the time stipulated for completion had expired, at the request of appellant, owing to unavoidable delays in procuring the necessary material, the Quartermaster General of the Army, within his discretion under the contract, orally waived the time limit in the contract, and subsequently, on April 2, 1904, confirmed the waiver by letter.

On April 1, 1904, or ninety-five days, exclusive of Sundays and holidays, after the time fixed in the contract, the Quartermaster General directed the depot quartermaster at New York to make final payment for the steamer, retaining, however, the 10% to make good any defects there might be in the material and workmanship. On July 13, 1904, the entire sum stipulated to be paid by the Government was paid without any deduction whatever.

It does not appear that appellant unreasonably delayed the work after the waiver of the time limit, or that the Government suffered any actual pecuniary loss or damage by reason of the delay in the completion and delivery of the steamer.

The court found the facts as to the other contract as set out in the petition of appellant and that appellant was paid the stipulated price therefor, less the sum of \$4,750, "which [we quote from the findings, 48 Ct. Cls., p. 53] the defendants (the United States) claim was the amount arising as liquidated damages for the ninety-five days' delay of the claimant (appellant here) in the completion of the steamer under the first contract hereinbefore referred to and which amount the defendants further claim was inadvertently and under mistake of fact paid to the claimant company" (appellant). And the court recites

the act of God, war, fire, or strikes and lockouts of workmen affecting the working of this contract, the date of completion of the steamer may be extended for such period as may be deemed just and reasonable by the party of the first part, to cover the time lost from any of the above mentioned causes."

that the Government set up by way of counterclaim the amount so paid and that the Government claimed such sum was due as liquidated damages for the ninety-five days' delay of the claimant (appellant) in the execution of the first contract and claimed further that such sum was "inadvertently, improperly and illegally paid by the officers of the Government." The record shows that the counterclaim was filed February 15, 1912.

From the findings of fact the court decided "as a conclusion of law that the petition be dismissed." And this as a consequence of sustaining the counterclaim of the Government, the court deciding that a waiver of the time limit "did not embrace and release from the payment of the agreed damages, which were assessable upon its (appellant's) default." The court said (48 Ct. Cls., p. 60), "Under such circumstances an officer, in the absence of some provision of law or contract therefor, would have no authority to release a contractor from the provision for liquidated damages so arising." This appeal was then taken.

Appellant attacks the conclusion of the court and contends that "the waiver of the time limit in the first contract necessarily tolled the provision in that contract for liquidated damages." The Government, on the other hand, maintains "that the waiver of the time limit simply estopped the Government from annulling the contract, but that this in no way affected the other terms of the contract." It is the effect of the contention of the Government, curious certainly at first impression if we consider the intention of the parties, that the time limit was waived but its sanction was retained, and what seemed to be concession to a delay which was without fault (so found by the Court of Claims) carried with it the full rigor of the bond.

It may be that the Government would have had the right to annul the contract upon the default of appellant

and avail itself of resultant remedies. It did not do so, but preferred to retain the contract and extend the time of its execution; and, we may assume, upon a consideration of the circumstances—as much in view of the Government's interest as appellant's interest, the Government suffering no damage by the delay, but getting the instrumentality for which it had contracted in time for its purpose, sooner, indeed, it may be, than if it had annulled the contract with appellant and re-let the work to another. These were considerations which the Quartermaster General, in the Government's interest, might well entertain. And it may have seemed to that officer that it would have been as harsh as it would have been useless to sacrifice what had been already done, and faithfully done, by annulling the contract or by refusing to excuse the delay in final performance which was without fault. The case should be judged by that consideration and conduct. But the Government insists that these seemingly natural suppositions cannot be indulged and urges against them the principle of building contracts that if the builder has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party has the option of abandoning the contract for such failure or of permitting the party in default to go on. If he chooses the latter course he so far waives absolute performance as to be liable on his covenant for the contract price of the work when completed. For the injury done him through the broken covenant he may sue, or, if he waits to be sued, he may recoup the damages thus sustained in reduction of the sum due upon the contract for the completed work. *Phillips v. Seymour*, 91 U. S. 646, and *United States v. Bethlehem Steel Company*, 205 U. S. 105, are cited. Cases are also cited which declare the same principle in regard to contracts for the sale and delivery of goods where time is of the essence of the contract. The latter cases were cases of actual damages, and so also was

Phillips v. Seymour, where, there being no legal evidence of actual damage, it was decided none could be recovered.

It may be said that a provision for liquidated damages is a declaration by the parties of the fact of damage from delay in the performance of the work contracted for and the measure of its amount, it not being susceptible of exact ascertainment. *United States v. Bethlehem Steel Company*, *supra*, is adduced for the application of the proposition to the case at bar. The contract in that case was entered into when war was imminent with Spain and was for the delivery of gun carriages. It contained a clause for a deduction, in the discretion of the Chief of Ordnance, of \$35.00 per day from the price to be paid for each day of delay in the delivery of each carriage. The clause was held, considering the circumstances, to be not a penalty but a provision for liquidated damages and that it was competent for the parties to the contract to provide the latter, and, having so provided, recovery might be had "for the amount stated as liquidated damages upon the violation of the contract and without proof of the damages actually sustained." It will be observed, therefore, that a condition of recovery was proof of violation of the contract. The condition does not exist in the case at bar. The contract was not violated. The time for its performance was extended and, we may observe, before any default had occurred. In that case there was no waiver of the time limit; in the case at bar there was an express waiver. That case, therefore, fails in its asserted analogy. Undoubtedly parties may agree that time shall be of the essence of their contract and, the proper legal conditions existing, may stipulate for damages and the measure of them, but they may subsequently change their views and requirements and consider that performance within the stipulated time is unimportant.

Flynn v. Des Moines Ry., 63 Iowa, 490, is directly in point. The plaintiff in the case entered into a contract

with the railroad to construct part of its line. Payments for the work were to be made monthly upon the certificate of the engineer of the company, and it was covenanted that 10% from the value of the work as an agreed compensation for damages should be retained by the company in case of failure by Flynn to complete the whole amount of the work according to the stipulations of the agreement. It was contended by the railway company that it was entitled to retain the 10% as liquidated damages. The court found that the stipulation as to time was waived and by being waived was eliminated from the contract and the railway company was not entitled to any sum as liquidated damages.

In the present case, as we have seen from the findings, there was no thought by the officers of the Government of a culpable delinquency on the part of the appellant or of detriment to the Government. The steamer was delivered, tested, approved and paid for.

It was held, however, by the Court of Claims that the Quartermaster General had no power to waive the provision for liquidated damages. It is not clear that counsel contends for so broad a proposition. His contention is that "the Government is not bound by the acts of its officers in making unauthorized payments through mistake of fact or of law." There was no mistake of fact, and by mistake of law counsel may mean, the action of the Quartermaster General was outside of the scope of the official authority given him by law. If that officer so acted the Government is not bound by his acts. *Wisconsin Central R. R. v. United States*, 164 U. S. 190, 212, and *Logan v. United States*, 169 U. S. 255, 259.

The cited cases (they are those upon which the Government relies) involved the construction of statutory law, in other words, of a specific law which was the source of the officer's authority. The case at bar is a case of contract, authorized by law, necessarily entered into and

conducted by the officers of the Government and as necessarily they must have had the powers to make it effective in its beginning and progress. The Court of Claims recognized this and found that (48 Ct. Cls., p. 52) "the Quartermaster General, United States Army, within his discretion under the contract, orally waived the time limit in said contract,"—a very essential discretion which might have been embarrassed or defeated if it had not extended to what depended upon the time limit of the contract. We think the case, therefore, falls under the ruling of *Salomon v. United States*, 19 Wall. 17, 19–20, where it is said that "The Act of 1862 (12 Stat. 411), requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter, accepting delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid." See also *District of Columbia v. Camden Iron Works*, 181 U. S. 453.

Judgment reversed and cause remanded with direction to dismiss the counter petition of the Government and to enter judgment for appellant in the amount claimed by it.

MR. JUSTICE McREYNOLDS took no part in the consideration and decision of the case.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914

No. 381

J. D. LANKFORD, JOHN J. GERLACH, W. F. BARBER, AND
A. D. KENNEDY, COMPOSING THE STATE BANKING
BOARD OF THE STATE OF OKLAHOMA, APPELLANTS,

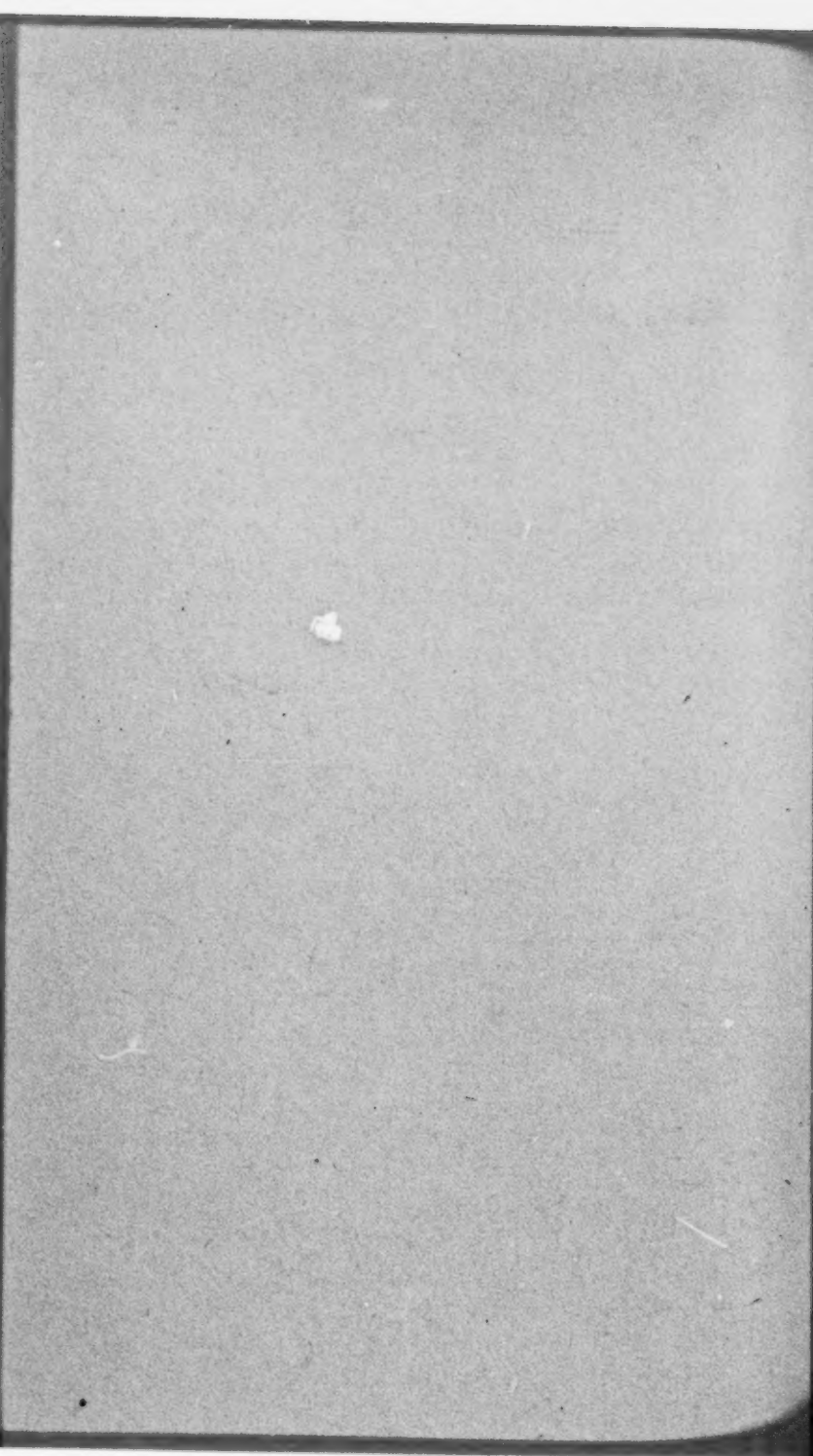
vs.

PLATTE IRON WORKS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF OKLAHOMA.

FILED MARCH 5, 1914.

(24,080)



(24,080)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 929.

J. D. LANKFORD, JOHN J. GERLACH, W. F. BARBER, AND
A. D. KENNEDY, COMPOSING THE STATE BANKING
BOARD OF THE STATE OF OKLAHOMA, APPELLANTS,

vs.

PLATTE IRON WORKS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF OKLAHOMA.

INDEX.

	Original.	Print
Original citation, with acceptance of service.....	1	1
Second amended and supplemental bill of complaint.....	3	2
Exhibits A and B—Certificates of deposit.....	17	9
Motion to dismiss second amended bill of complaint.....	20	11
Order overruling motion to dismiss second amended bill of com- plaint	21	12
Final decree	22	12
Order assigning matter of settling appeal for hearing.....	25	14
Order reassigning matter of settling appeal for hearing.....	26	14
Petition for appeal and order allowing same.....	27	14
Assignment of errors.....	31	16
Præcipe for transcript by defendants.....	33	17
Motion for and order allowing plaintiff to file præcipe for addi- tional portions of record.....	34	18
Præcipe for additional portions of record by plaintiff.....	35	18

	Original. Print	
Statement of evidence and order approving same.....	36	19
Plaintiff's evidence	36	19
Stipulation between plaintiff and defendant.....	36	19
Testimony of C. F. Wurtzberger.....	37	19
Ira J. Anderson.....	38	21
B. B. Burnett.....	39	21
Defendant's evidence	43	24
Testimony of John G. Ellinghausen.....	43	24
J. D. Lankford.....	44	24
L. J. Roach.....	50	28
Plaintiff's evidence in rebuttal.....	51	29
Testimony of C. F. Wurtzberger.....	51	29
Order approving statement of evidence.....	52	30
Bond on appeal.....	53	30
Clerk's certificate to transcript.....	55	31

1 In the District Court of the United States for the Western
District of Oklahoma.

No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Complainant,
vs.

J. D. LANKFORD, JOHN J. GERLACH, A. D. KENNEDY, and W. F.
BARBER, Defendants.

Citation.

UNITED STATES OF AMERICA:

To Platte Iron Works Company, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Western District of Oklahoma, wherein the Platte Iron Works Company is complainant, and J. D. Lankford, John J. Gerlach, W. F. Barber, and A. D. Kennedy composing the State Banking Board of the State of Oklahoma, are defendants, an appeal has been allowed the defendants therein to the Supreme Court of the United States. You are hereby cited and admonished to be and appear in said court at Washington thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed therefrom should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 27 day of January, A. D. 1914.

JOHN H. COTTERAL,
United States District Judge.

Jan. 27, 1914.

Service accepted.

CHAS. A. LOOMIS,
Sol. for Pl^tff.

2 [Endorsed:] No. 1. In the District Court of the United States for the Western District of Oklahoma. The Platte Iron Works Company, a corporation, vs. J. D. Lankford et al., Defendants. Citation. Due and legal service of the within citation acknowledged this — day of —, 1914. — —, Solicitor for Platte Iron Works Company, complainant. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

3 In the District Court of the United States in and for the
Western District of the State of Oklahoma.

In Equity. No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Plaintiff,
vs.

J. D. LANKFORD, LEE CRUCE, J. C. MCCLELLAND, F. G. DENNIS,
John J. Gerlach, A. D. Kennedy, and W. F. Barber, Defendants.

Second Amended and Supplemental Bill of Complaint.

First Count.

The plaintiff in this its second amended and supplemental bill of complaint herein, for its cause of action alleges:

That the Platte Iron Works Company, is a corporation organized and incorporated under the laws of the State of Maine, and is a citizen of the State of Maine.

That the defendant, J. D. Lankford, was at the times herein mentioned and is the duly qualified and acting bank commissioner of the State of Oklahoma; and that the defendants Lee Cruce, J. C. McClelland and F. G. Dennis, were at the times herein mentioned, and at the time of the commencement of this suit up to and until the change of the law, and the appointment of a new banking board as hereinafter alleged, the duly qualified and acting members of the State Banking Board of Oklahoma.

That since the beginning of this suit, and at the last session of the Legislature of the state of Oklahoma, by Senate Bill No. 231 which was duly enacted and became a law, the law governing
4 the depositors' guaranty fund, was amended creating a new banking board and prescribing their duties, and that under and pursuant to said law, the defendants John J. Gerlach, A. D. Kennedy, and W. F. Barber were duly and legally appointed members of the State Banking Board, succeeding the defendants Lee Cruce, J. C. McClelland and F. G. Dennis; and the said defendants, John J. Gerlach, A. D. Kennedy and W. F. Barber are now the duly qualified and acting members of the State Banking Board of the State of Oklahoma.

That the Farmers & Merchants Bank, was and is a corporation duly and legally incorporated as a banking institution under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business in Sapulpa, Creek County, Oklahoma, at which place it conducted a state bank, under and pursuant to the laws of Oklahoma, governing State Banks, until said bank was closed and taken possession of by the defendant, J. D. Lankford, the State Bank Commissioner, on or about the 10th day of September, 1912, as hereinafter alleged.

That heretofore to wit, on the 8th day of June, 1912, E. J. Merkle

& Company, of Kansas City, Missouri, deposited in said Farmers & Merchants Bank, the sum of \$3,900.00 and said Farmers & Merchants Bank, at said time issued and delivered to said E. J. Merkle & Company a certificate of deposit, evidencing said deposit, which said certificate of deposit is as follows:

"SAPULPA, OKLA., June 8, 1912. No. 1012.

This is to certify that E. J. Merkle & Company has deposited with Farmers and Merchants Bank, State and County Depository, deposits guaranteed, \$3,900.00 Thirty-nine hundred Dollars. Payable 60 days *months* after date on the return of this Certificate properly endorsed, with interest at the rate of 3 per cent per annum, if left 3 mo. and 4% per annum if left 6 mo.
(Not over Four Thousand \$4,000.)

B. B. BURNETT, *Cashier.*

Certificate of Deposit.
Not subject to check."

That said sum of \$3,900.00 evidenced by said certificate of deposit, continued in and remained on deposit in said bank from said date until the failure of said bank, and until the same was taken possession of by said J. D. Lankford, State Bank Commissioner, of the State of Oklahoma as herein alleged.

Thereafter and before the maturity said deposit and said certificate of deposit was sold, assigned and transferred, by E. J. Merkle & Company, for value to the Trustees, The Platte Iron Works Company, Dayton, Ohio, by endorsement on said certificate of deposit; that thereafter and before maturity said deposit and said certificate of deposit was sold, assigned and transferred by said Trustees, the Platte Iron Works Company, Dayton, Ohio, for value to the City National Bank, of Dayton, Ohio, by endorsement on said certificate of deposit; that thereafter and before maturity said deposit and said certificate of deposit was sold, assigned, transferred by the City National Bank, Dayton, Ohio, for value to the Trustees, The Platte Iron Works Company, by endorsement on said certificate; that thereafter said deposit and said certificate of deposit was sold, assigned and transferred by the Trustees, the Platte Iron Works Company for value to the Platte Iron Works Company, Dayton, Ohio, plaintiff herein, by endorsement on said certificate of deposit, who is now the legal owner and holder thereof. That a copy of said certificate and the endorsements thereon is herewith filed, marked "Exhibit A" and made a part hereof.

Plaintiff further alleges that on or about the 10th day of September, 1912, the defendant J. D. Lankford, as Bank Commissioner of the State of Oklahoma, took possession of the Farmers & Merchants Bank of Sapulpa, and all of its assets, and property, and proceeded to wind up its affairs, under and in accordance with the laws of the state of Oklahoma, and from said date hitherto, has been and still is in full possession and control of the same.

That said deposit and said certificate of deposit have not been

paid, and the same is still due and unpaid; that the defendants Lee Cruce, J. C. McClelland and F. G. Dennis, who constituted the State Banking Board of the State of Oklahoma, until the change in said banking board as herein alleged, were at all of said times up until said change in said board in full possession, management and control of the depositors' guaranty fund of the state of Oklahoma, and that the defendants John J. Gerlach, A. D. Kennedy, W. F. Barber, have been since said change hitherto, and are now the legally qualified and acting members of the State Banking Board of the State of Oklahoma, and ever since their appointment and qualification, have been and are in full possession, management and control of the depositors' guaranty fund of the State of Oklahoma; that it became, was and is the duty of said State Banking Board to pay the depositors of the Farmers & Merchants Bank aforesaid, including this plaintiff, out of the depositors' guaranty fund, in accordance with the laws of the State of Oklahoma; and if at any time the depositors' guaranty fund on hand shall be insufficient to pay the depositors, and other indebtedness properly chargeable against the same, it became and was and is the duty of the said State Banking Board, to issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," to liquidate the deposits and other indebtedness properly chargeable against the Depositors' Guaranty Fund.

7 Plaintiff further alleges that said deposit and said certificate of deposit is an indebtedness properly chargeable against the depositors' guaranty fund of the State of Oklahoma.

Plaintiff further alleges that prior to the beginning of this suit demand was made of the State Banking Board, to pay said deposit and said certificate of deposit out of the depositors' guaranty fund, and if said fund was not sufficient to pay same, that said state banking board issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma," for said deposit and said certificate of deposit, bearing six per cent interest, as provided by law, all of which was refused by said State Banking Board.

Plaintiff further alleges that since the amendment of the law as herein alleged governing the State Banking Board, and the Depositors' Guaranty Fund, and since the appointment, qualification and organization of the present State Banking Board, composed of the said defendants John J. Gerlach, A. D. Kennedy, and W. F. Barber, demand was duly made of the said State Banking Board to pay said deposit and said certificate of deposit out of the Depositors' Guaranty Fund, and if said fund was not sufficient to pay same, that the said State Banking Board issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma" for said deposit and said certificate of deposit, bearing six per cent interest, as provided by law, all of which was refused by said State Banking Board.

Plaintiff further alleges that said deposit and said certificate of deposit is still due and owing to plaintiff and there is now due and owing the plaintiff therefor, the sum of \$3,900.00 together with four per cent

interest from June 8th, 1912, and that plaintiff is entitled to payment thereof, out of the Depositors' Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma.

8 That the defendants J. D. Lankford, Lee Cruce, J. C. McClelland, F. G. Dennis, John J. Gerlach, A. D. Kennedy and W. F. Barber, are residents and citizens of the State of Oklahoma, and of the Western District in said State; that the official office and place of business of said J. D. Lankford, State Bank Commissioner, and the said State Banking Board, is in the city of Oklahoma, State of Oklahoma, and in the Western District of said State; that the matters and amount in dispute exceed, exclusive of interest and costs, the sum and value of \$3,000.00.

In consideration whereof, for as much as the plaintiff is remediless in the premises, and is by the strict rules of common law, only relievable in a court of equity, where matters of this nature are cognizable, the plaintiff prays that upon a final hearing of this cause, a decree be entered herein ordering, adjudging and decreeing that the plaintiff is the owner of, and entitled to the said deposit and certificate of deposit, and interest thereon, and is entitled to have the same paid of the Depositors' Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma, and in the possession and under the supervision and management of the State Banking Board, of the State of Oklahoma, composed of John J. Gerlach, A. D. Kennedy, and W. F. Barber, defendants herein; and in case the Depositors' Guaranty Fund on hand is insufficient to pay the same, that plaintiff be and is entitled to have issued to plaintiff, certificates of indebtedness, to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," to liquidate said deposit and said certificate of deposit; and that said John J. Gerlach, A. D. Kennedy, and W. F.

9 Barber, composing said State Banking Board of the State of Oklahoma, be ordered, commanded and required to pay said deposit and interest thereon, out of the Depositors' Guaranty Fund; and if there are not sufficient funds in said Depositors' Guaranty Fund, available therefor, that the said State Banking Board be ordered, commanded and required to issue to plaintiff certificates of indebtedness for the amount of such certificate of deposit, to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," bearing six per cent interest, as provided by section 3, of Article 2, of Chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last session of the State Legislature of the State of Oklahoma; and that said John J. Gerlach, A. D. Kennedy and W. F. Barber, composing the State Banking Board, be ordered, commanded and required to levy an assessment against the capital stock of each and every bank and trust company organized and existing under the laws of the State of Oklahoma, for the purpose of increasing such Depositors' Guaranty Fund, and paying said deposit, and said certificates of indebtedness, known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma, and for such other and further relief as shall seem meet and agreeable in equity and good conscience.

Second Count.

The plaintiff for its second cause of action herein alleges:

That the Platte Iron Works Company, is a corporation organized and incorporated under the laws of the State of Maine, and is a citizen of the State of Maine.

That the defendant J. D. Lankford, was at the times herein mentioned, and is the duly qualified and acting bank commissioner of the State of Oklahoma; and that the defendants Lee Cruce, 10 J. C. McClelland and F. G. Dennis, were at the times herein mentioned, and at the times of the commencement of this suit up to and until the change of the law, and the appointment of a new banking board as hereinafter alleged, the duly qualified and acting members of the State Banking Board of Oklahoma. That since the beginning of this suit, and at the last session of the Legislature of the State of Oklahoma, by Senate Bill No. 231, which was duly enacted and became a law, the law governing the Depositors' Guaranty Fund, was amended creating a new banking board and prescribing their duties, and that under and pursuant to said law, the defendants John J. Gerlach, A. D. Kennedy and W. F. Barber were duly and legally appointed members of the State Banking Board, succeeding the defendants Lee Cruce, J. C. McClelland and F. G. Dennis; and the said defendants John J. Gerlach, A. D. Kennedy and W. F. Barber are now the duly qualified and acting members of the State Banking Board of the State of Oklahoma.

That the Farmers & Merchants Bank, was and is a corporation duly and legally incorporated as a Banking institution, under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business in Sapulpa, Creek County, Oklahoma, at which place it conducted a state bank, under and pursuant to the laws of Oklahoma, governing State Banks until said bank was closed and taken possession of by the defendant, J. D. Lankford, the State Bank Commissioner, on or about the 10th day of September, 1912, as hereinafter alleged.

That heretofore, to wit, on the 8th day of June, 1912, E. J. Merkle & Company, of Kansas City, Missouri, deposited in said Farmers & Merchants Bank, the sum of \$3,900.00 and said Farmers & Merchants Bank, at said time issued and delivered to said E. J. 11 Merkle & Company a certificate of deposit, evidencing said deposit, which said certificate of deposit is as follows:

"SAPULA, OKLA., June 8, 1912. No. 1013.

This is to certify that E. J. Merkle & Company Has deposited with Farmers and Merchants Bank, State and County Depository, deposits guaranteed, \$3,900.00 Thirty-nine Hundred dollars, payable 3 months after date on the return of this certificate properly endorsed, with interest at the rate of 3 per cent per annum, if left 3 mo. or 4% per annum if left 6 mo.

(Not over Four Thousand \$4,000\$.)

B. B. BURNETT, *Cashier.*

Certificate of Deposit.
Not subject to check."

That said sum of \$3,900.00 evidenced by said certificate of deposit, continued in and remained on deposit in said bank from said date until the failure of said bank, and until the same was taken possession of by said J. D. Lankford, State Bank Commissioner, of the State of Oklahoma, as herein alleged.

Thereafter and before maturity said deposit and said certificate of deposit was sold, assigned and transferred by E. J. Merkle & Company, for value to the Trustees, The Platte Iron Works Company, Dayton, Ohio, by endorsement on said certificate of deposit; that thereafter and before maturity said deposit and said certificate of deposit was sold, assigned and transferred by said Trustees, The Platte Iron Works Company, Dayton, Ohio, for value to the City National Bank, Dayton, Ohio, by endorsement on said certificate of deposit; that thereafter and before maturity said deposit and said certificate of deposit was sold, assigned and transferred by the City National

12 Bank, Dayton, Ohio, for value to the Trustees, The Platte Iron Works Company, by endorsement on said certificate; that thereafter said deposit and said certificate of deposit was sold, assigned and transferred by the Trustees, The Platte Iron Works Company, for value to The Platte Iron Works Company, Dayton, Ohio, plaintiff herein, by endorsement on said certificate of deposit, who is now the legal owner and holder thereof. That a copy of said certificate and the endorsements thereon is herewith filed marked "Exhibit B" and made a part hereof.

Plaintiff further alleges that on or about the 10th day of September, 1912, the defendant, J. D. Lankford, as Bank Commissioner of the State of Oklahoma, took possession of the Farmers & Merchants Bank of Sapulpa, and all of its assets, and property, and proceeded to wind up its affairs, under and in accordance with the laws of the State of Oklahoma, and from said date hitherto, has been and still is in full possession and control of the same.

That said deposit and said certificate of deposit have not been paid, and the same is still due and unpaid; that the defendants Lee Cruce, J. C. McClelland and F. G. Dennis, who constituted the State Banking Board of the State of Oklahoma, until the change in said Banking board as herein alleged, were at all of said times up until said change in said board in full possession, management and control of the Depositors' Guaranty Fund of the State of Oklahoma, and that the defendants John J. Gerlach, A. D. Kennedy and W. F. Barber, have been since said change, hitherto, and are now the legally qualified and acting members of the State Banking Board of the State of Oklahoma, and ever since their appointment and qualification, have been and are in full possession, management, and control of the Depositors' Guaranty Fund of the State of Oklahoma; that it be-

13 came, was, and is the duty of the State Banking Board to pay the depositors of the Farmers & Merchants Bank aforesaid, including this plaintiff, out of the Depositors' Guaranty Fund, in accordance with the laws of the State of Oklahoma; and if at any time the Depositors' Guaranty Fund on hand shall be insufficient to pay the depositors, and other indebtedness properly chargeable against the same, it became and was and is the duty of the said State Bank-

ing Board, to issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," to liquidate the deposits and other indebtedness properly chargeable against the Depositors' Guaranty Fund.

Plaintiff further alleges that said deposit and said certificate of deposit is an indebtedness properly chargeable against the Depositors' Guaranty Fund of the State of Oklahoma.

Plaintiff further alleges that prior to the beginning of this suit demand was made of the State Banking Board, to pay said deposit and said certificate of deposit out of the Depositors' Guaranty Fund, and if said fund was not sufficient to pay same, that said State Banking Board issue certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," for said deposit and said certificate of deposit, bearing six per cent interest, as provided by law, all of which was refused by said State Banking Board.

Plaintiff further alleges that since the amendment of the law as herein alleged governing the State Banking Board, and the Depositors' Guaranty Fund, and since the appointment, qualification and organization of the present State Banking Board, composed of the said defendants John J. Gerlach, A. D. Kennedy, and W. F. Barber, demand was duly made of the said State Banking Board to pay said deposit and said certificate of deposit out of the Depositors' Guaranty Fund, and if said fund was not sufficient to pay same, that the said State Banking Board issue certificates of indebtedness, to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma" for said deposit and said certificate of deposit, bearing six per cent interest, as provided by law, all of which was refused by said State Banking Board.

Plaintiff further alleges that said deposit and said certificate of deposit is still due and owing to plaintiff and there is now due and owing the plaintiff therefor, the sum of \$3,900.00 together with four per cent interest from June 8th 1912, and that plaintiff is entitled to payment thereof, out of the Depositors' Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma.

That the defendants J. D. Lankford, Lee Cruce, J. C. McClelland, F. G. Dennis, John J. Gerlach, A. D. Kennedy, and W. F. Barber, are residents and citizens of the State of Oklahoma, and of the Western District in said State; that the official office and place of business of said J. D. Lankford, State Bank Commissioner, and the said State Banking Board, is in the City of Oklahoma, State of Oklahoma, and in the Western District of said State; that the matters and amount in dispute exceed, exclusive of interest and costs, the sum and value of \$3,000.00.

In consideration whereof, for as much as the plaintiff is remediless in the premises, and is by the strict rules of common law, only relievable in a court of equity, where matters of this nature are cognizable, the plaintiff prays that upon a final hearing of this cause, a decree be entered herein ordering, adjudging and decreeing that the plaintiff is the owner of, and entitled to the said deposit and cer-

15 tificate of deposit, and interest thereon, and is entitled to have the same paid out of the Depositors' Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma, and in the possession and under the supervision and management of the State Banking Board, of the State of Oklahoma, composed of John J. Gerlach, A. D. Kennedy, and W. F. Barber, defendants herein; and in case the Depositors' Guaranty Fund on hand is insufficient to pay the depositors of said bank, and other indebtedness, chargeable against same, that plaintiff be and is entitled to have issued to plaintiff, certificates of indebtedness, to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," to liquidate said deposit, and said certificate of deposit; and that said John J. Gerlach, A. D. Kennedy, and W. F. Barber, composing said State Banking Board, of the State of Oklahoma, be ordered, commanded and required to pay said deposit and interest thereon, out of the Depositors' Guaranty Fund; and if there are not sufficient funds in said Depositors' Guaranty Fund, available therefor, that the said State Banking Board be ordered, commanded and required to issue to plaintiff certificates of indebtedness for the amount of such certificate of deposit, to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," bearing six per cent interest, as provided by section 3, of Article 2, of Chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last session of the State Legislature of the State of Oklahoma; and that said John J. Gerlach, A. D. Kennedy and W. F. Barber, composing the State Banking Board, be ordered, commanded, and required to levy an assessment against the capital stock of each and every bank and trust company organized and existing under the laws of the State of Oklahoma, for the purpose of increasing such Depositors' Guaranty Fund, and paying said deposit, and said certificates of indebtedness, known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma, and for such other and further relief as shall seem meet and agreeable in equity and good conscience.

16

CHAS. A. LOOMIS,
Att'y for Plaintiff.

17 "EXHIBIT A."

Copy.

SAPULPA, OKLA., June 8, 1912. No. 1012.

This is to certify that E. J. Merkle & Company, has deposited with Farmers and Merchants Bank, State and County Depository, deposits guaranteed, \$3,900.00 Thirty-nine Hundred Dollars payable 60 days *months* after date on the return of this certificate properly endorsed, with interest at the rate of 3 per cent per annum if left 3 mo. and 4% per annum if left 6 mo.

(Not over Four Thousand \$4,000\$.)

Certificate of deposit.
Not subject to check.

B. B. BURNETT, *Cashier.*

(Endorsed on the back as follows:)

Pay to the order of Trustees The Platte Iron Works Co., Dayton, Ohio.

E. J. MERKLE & CO.,
By E. J. MERKLE.

Pay to the order of The City Nat'l Bank, Dayton, Ohio.

TRUSTEES THE PLATTE IRON WORKS
Co.

J. F. HARTLIEB, *Chairman*.

Pay Trustees Platte Iron Works Co., or order, without recourse on us.

CITY NAT'L BANK, DAYTON, OHIO.
CLARENCE KEIFER, *Cashier*.

Pay to the order of the Platte Iron Works Co.

TRUSTEES OF THE PLATTE IRON
WORKS CO.,

By E. F. PLATTE, *Treas.*

"EXHIBIT B."

Copy.

SAPULPA, OKLA., June 8, 1912. No. 1013.

This is to certify that E. J. Merkle & Company Has Deposited with Farmers and Merchants Bank, State and County Depository, deposits guaranteed, \$3,900.00, Thirty — Hundred Dollars, payable 3 months after date on the return of this certificate properly endorsed, with interest at the rate of 3 per cent per annum, if left 3 mo. or 4% per annum if left 6 mo.

(Not over four thousand \$4,000\$.)

B. B. BURNETT, *Cashier*.

Certificate of Deposit.

Not subject to check.

(Endorsed on the back as follows:)

Pay to the order of Trustees The Platte Iron Works Co., Dayton, Ohio.

By E. J. MERKLE & CO.;
By E. J. MERKLE.

Pay to the order of City Nat'l Bank, Dayton, Ohio.

TRUSTEES THE PLATTE IRON WORKS
CO.

J. F. HARTLIEB, *Chairman*.

Pay Trustees Platte Iron Works Co., or order, without recourse on us,

CITY NATIONAL BANK, DAYTON,
OHIO.

Pay to the order of the Platte Iron Works Co.

TRUSTEES OF THE PLATTE IRON
WORKS CO.,

By E. F. PLATTE, *Treas.*

19 Endorsed: No. 1. Platte Iron Works Company, Plaintiff,
vs. J. D. Lankford, et al., Defendants. Second Amended and
Supplemental Bill of Complaint. Filed April 4, 1913. Arnold C.
Dolde, Clerk. Chas. A. Loomis, Attorney for plaintiff.

20 In the District Court of the United States for the Western
District of Oklahoma.

No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Complainant,
vs.

J. D. LANKFORD, LEE CRUCE, J. C. MCCLELLAND, F. G. DENNIS,
John J. Gerlach, A. D. Kennedy, and W. F. Barber, Defend-
ants.

Motion to Dismiss Second Amended Bill of Complaint.

And now come the defendants, J. D. Lankford, Lee Cruce, J. C. McClelland, F. G. Dennis, John J. Gerlach, A. D. Kennedy and W. F. Barber, by Chas. West, Attorney General of the State of Oklahoma, and move the Court to dismiss plaintiff's second amended bill of complaint for the following reason:

That the Court has no jurisdiction of the subject of the action or the persons of the defendants, said suit being one against the State of Oklahoma without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States.

Wherefore, defendants pray judgment whether they shall further answer, and that they may be dismissed with their costs.

CHAS. WEST,

Attorney General of the State of Oklahoma.

Endorsed: No. 1. In the District Court of the United States for the Western District of Oklahoma. The Platte Iron Works Company, a corporation, Plaintiff, vs. J. D. Lankford, et al. Defendants. Filed April 24, 1913. Arnold C. Dolde, Clerk By Frank T. McCoy, Deputy. Chas. West, Attorney General.

21 In the District Court of the United States for the Western District of Oklahoma.

In Equity. Number 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Plaintiff,
vs.
J. D. LANKFORD et al., Defendants.

Order.

On this fifteenth day of July, 1913, the motion of the defendants to dismiss the plaintiff's second amended bill of complaint herein comes on for determination, and the court, being duly advised in the premises, orders that the said motion be and it is hereby overruled; and it is further ordered that the defendants plead to the said bill in thirty days from this date. To the foregoing orders and each of them the defendants except.

JOHN H. COTTERAL,
District Judge.

Endorsed: No. 1. Platte Iron Works Co. vs. J. D. Lankford, et al. Order overruling motion to dismiss bill. Filed July 15, 1913. Arnold C. Dolde, Clerk.

22 In the District Court of the United States in and for the Western District of the State of Oklahoma.

In Equity. No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Plaintiff,
vs.
J. D. LANKFORD, LEE CRUCE, J. C. MCCLELLAND, F. G. DENNIS, John J. Gerlach, A. D. Kennedy, and W. F. Barber, Defendants.

Now on this 7th day of January, 1914, this cause coming on to be heard upon the second amended bill of complaint of the plaintiff, and the answer of the defendants; the parties appearing in person and by their attorneys, and all and singular the matters in issue were submitted to the court and the court having heard the evidence, and being fully advised in the premises:

It was ordered, adjudged and decreed by the court that on June 8th, 1912, E. J. Merkle & Company, deposited in the Farmers & Merchants Bank of Sapulpa, Oklahoma Seventy-eight Hundred Dollars (\$7,800.00) and accepted and received from said Bank, as evidence of said deposit the two certificates of deposit, described in the first and second counts of plaintiff's second amended bill of complaint; and that thereafter, and before the maturity of said Certificates of Deposit, the plaintiff acquired said deposits and said certificates of deposit from said E. J. Merkle & Company, by purchase, for value, and is now the owner and holder of said deposits and said certificates of deposit.

23 The court further finds, adjudges and decrees that plaintiff as the holder and owner of said deposits and said certificates of deposit, be and is entitled to have said deposits and said certificates of deposit allowed by the state banking board of the state of Oklahoma, as a valid claim against the depositors' guaranty fund of the state of Oklahoma, and is entitled to have said deposits paid out of the depositors' guaranty fund of the state of Oklahoma, on an equal basis with all depositors of failed banks in said state, and if at any time the depositors' guaranty fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against the same, that plaintiff be and is entitled to have the state banking board of Oklahoma issue to plaintiff certificates of indebtedness to be known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," and that plaintiff is entitled to interest on said certificates of deposit, at three per cent per annum until September 10, 1912, and six per cent per annum thereafter to this date.

It is further ordered, adjudged and decreed by the court that plaintiff have and recover of and from the defendants, J. D. Lankford, John J. Gerlach, A. D. Kennedy, and W. F. Barber as members of the State Banking board of the state of Oklahoma the sum of \$4,241.25 on the first count in plaintiff's second amended bill of complaint, and that the same be paid out of and from the depositors' guaranty fund *fund* of the state of Oklahoma. And if the depositors' guaranty fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against it, then by a certificate of indebtedness known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma," sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

24 It is further ordered, adjudged and decreed by the court that plaintiff have and recover of and from the defendant, J. D. Lankford, John J. Gerlach, A. D. Kennedy, and W. F. Barber, as members of the State Banking Board of the State of Oklahoma, the sum of \$4,241.25 on the second count of plaintiff's second amended bill of complaint, and that the same be paid out of the depositors' guaranty fund of the state of Oklahoma. And if the depositors' guaranty fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against it, then by a certificate of indebtedness known as "Depositors' Guaranty Fund Warrants, of the State of Oklahoma" sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

It is further ordered, adjudged and decreed that the plaintiff recover of and from the defendants, J. D. Lankford, John J. Gerlach, A. D. Kennedy, and W. F. Barber, as members of the state banking board, its costs in this action.

JOHN H. COTTERAL, *Judge.*

Approved as to form.

JOS. L. HULL,

Ass't Att'y Gen.

Endorsed: No. 1. In Equity. Platte Iron Works Co. Plaintiff, vs. J. D. Lankford, et al. Defendants. Decree. Filed Jan. 7, 1914. Arnold C. Dolde, Clerk.

25 Thereafter, on January 23rd, 1914, the following proceedings were had in said case by said court, to-wit:

No. 1.

PLATTE IRON WORKS COMPANY, Plaintiff,
vs.
J. D. LANKFORD et al., Defendants.

Now on this 23rd day of January, 1914, it is ordered that the hearing upon the matter of settling the appeal by defendants herein, be and the same is hereby assigned for January 29th, 1914, at 10 o'clock a. m.

26 Thereafter, on January 26th, 1914, the following proceedings were had in said case by said court, to-wit:

No. 1.

PLATTE IRON WORKS COMPANY, Plaintiff,
vs.
J. D. LANKFORD et al., Defendants.

On this 26th day of January, 1914, it is ordered that the matter of the settling of the appeal herein, be re-assigned for hearing at Oklahoma City, in said District, on Friday, January 30th, 1914, at 10 o'clock a. m.

27 In the District Court of the United States for the Western District of Oklahoma.

No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Complainant,
vs.
J. D. LANKFORD, JOHN G. GERLACH, A. D. KENNEDY, and W. F. BARBER, Defendants.

Petition for Appeal.

The above named defendants, to-wit, J. D. Lankford, John J. Gerlach, A. D. Kennedy and W. F. Barber, conceiving themselves aggrieved by the final judgment and decree made and entered by the above court in said cause on the 7th of January, 1914, do hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed

herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

Petitioners show that there is no cash available in the Depositors' Guaranty Fund for the purpose of paying the judgment rendered in this cause; that petitioners' terms of office expire on the first of January, 1915, and since the decree of this case is rendered against them, in their official capacity, they should not be required to give a bond to pay out of the Depositors' Guaranty Fund or to issue Depositors' Guaranty Fund Warrants upon the final determination of this case on appeal, for the amount stated in said decree, for the
 28 reason that unless the appeal is finally determined prior to the first of January 1915 petitioners would be without power to comply with said decree.

Wherefore, Petitioners pray that this court make an order superseding the said decree without requiring of these defendants a supersedeas bond, but upon their issuing the Depositors' Guaranty Fund warrants in accordance with the decree in this cause, and depositing them with the Clerk of this Court, to be held by him, pending the final determination of the appeal, to be then delivered either to the complainants, or returned to defendants, or their successors in office, to be cancelled in accordance with such final judgment on appeal.

CHAS. WEST,

Attorney General;

JOS. L. HULL,

Assistant Attorney General;

Solicitors for Defendants.

29

Affidavit.

STATE OF OKLAHOMA,

County of Oklahoma, ss:

Personally appeared before me, the undersigned, an officer of the law authorized to administer oaths, J. D. Lankford, who being sworn upon oath says:

That he is Bank Commissioner of the State of Oklahoma, and as such the Chairman of the State Banking Board; that he has read the foregoing petition for appeal and that there is no cash available now for the purpose of paying the final decree in this cause, for the reason that the Depositors' Guaranty Fund Warrants heretofore issued, which under the law must be paid serially in the order of their issuance are greatly in excess of the cash on hand in the Depositors' Guaranty Fund.

J. D. LANKFORD.

Subscribed and sworn to before me this 22nd day of January, 1914.

[SEAL.]

E. F. SMITH,

Notary Public.

My commission expires Dec. 19, 1917.

30 Ordered that the appeal prayed for in the foregoing petition be and hereby is, allowed upon the approval of a bond on appeal *as* conditioned as required by law in the sum of Five Hundred (500) Dollars; the motion for supersedeas as prayed is denied; but said appeal shall operate as a supersedeas upon the defendants' giving a supersedeas bond conditioned as required by law in the sum of Eleven Thousand Dollars, and upon the same being approved.

JOHN H. COTTERAL,

Judge U. S. District Court.

Endorsed: No. 1. In the District Court of the United States for the Western District of Oklahoma. The Platte Iron Works Company, a corporation, Plaintiff, vs. J. D. Lankford, et al., Defendants. Petition for Appeal, etc. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

31 In the District Court of the United States for the Western District of Oklahoma.

No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Complainant,
vs.

J. D. LANKFORD, JOHN J. GERLACH, A. D. KENNEDY, and W. F. BARBER, Defendants.

Assignments of Error.

And now on this 23rd day of January, A. D. 1914, come the defendants by their solicitor, Chas. West, Attorney General, and say that the decree entered in the above cause on the 7th day of January, A. D. 1914, is erroneous and unjust to defendants.

First, because the court erred in overruling defendants' motion to dismiss the second amended bill of complaint for the following reasons, to-wit:

1. That said suit was an original action in mandamus, of which said court had no jurisdiction, the same not being ancillary to any judgment theretofore obtained.

2. Because said suit was in fact against the State of Oklahoma to which it had not given its consent and as such it was prohibited by the eleventh amendment to the Constitution of the United States, the defendants having no personal interest therein and being sued in their official capacity as agents of said state, all of which appeared on the face of the bill of complaint.

Second. Because the court erred in rendering final judgment in said action for the following reasons:

1. That said suit was an original action in mandamus, of which said court had no jurisdiction, the same not being ancillary to any judgment theretofore obtained.

32 2. Because said suit was in fact against the state of Oklahoma, to which it had not given its consent, and as such it

was prohibited by the Eleventh Amendment to the Constitution of the United States, the defendants having no personal interest therein and being sued in their official capacity as agents of said state, all of which appeared on the face of the bill of complaint.

3. Because the second amended bill upon its face stated no cause of action for the relief sought, or for any relief.

Wherefore, The defendants pray that the said decree be reversed and the district court directed to dismiss the bill at complainant's cost.

CHAS. WEST,
Attorney General;

JOS. L. HULL,
Assistant Attorney General;
Solicitors for Defendants.

Endorsed: No. 1. In the District Court of the United States for the Western District of Oklahoma. The Platte Iron Works Company, a corporation, vs. J. D. Lankford, et al. defendants. Assignment- of error. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

33 In the United States District Court for the Western District of Oklahoma.

In Equity. No. 1.

PLATTE IRON WORKS COMPANY, Complainant,
vs.

J. D. LANKFORD et al., Defendants.

Præcipe for Transcript of Record.

The Clerk of said Court will prepare a transcript of record in this case on appeal from this court to the Supreme Court of the United States and will include therein:

The second amended bill of complaint:

The motion to dismiss the second amended bill of complaint:

The order overruling the motion to dismiss; the final decree; and such other pleadings, orders, process, bonds etc. as may be filed in said cause after the 7th day of January, A. D., 1914.

CHAS. WEST, *Att'y Gen'l,*
Solicitor for Defendants,
By JOS. L. HULL,
Assistant Att'y Gen.

Service of copy of above præcipe upon me is acknowledged this 21st day of January, 1914.

CHAS. A. LOOMIS,
Solicitor for Complainant.

Endorsed: No. 1. In the U. S. District Court for the Western District of Oklahoma. Platte Iron Works Company, vs. J. D. Lankford, et al. Præcipe for transcript of record. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

34 In the District Court of the United States for the Western
District of Oklahoma.

In Equity. No. 1.

PLATTE IRON WORKS COMPANY, Complainant,

vs.

J. D. LANKFORD et al., Defendants.

Motion.

Comes now the complainants and appellee and represents to the court that it will be impossible for him to prepare and file his præcipe and additional portions of the record he desires incorporated therein within the time prescribed by rule 75, and he therefore prays additional time to file his præcipe herein and present therewith such additional portions of the record as he may desire incorporated therein.

CHAS. A. LOOMIS,
Solicitor for Complainant.

This January 27, 1914.

Order.

The above motion coming on for hearing, it is ordered by the court that the complainant be given until February 2nd, 1914 to file his præcipe herein, accompanying therewith such additional portions of the record as he shall desire incorporated therein, and that the entire record be completed within two days thereafter.

JOHN H. COTTERAL, *Judge.*

This January 27, 1914.

Endorsed: #1. Platte Iron Wks. vs. J. D. Lankford, et al. Motion and order. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

35 In the District Court of the United States for the Western
District of Oklahoma.

In Equity. No. 1.

PLATTE IRON WORKS COMPANY, Complainant,

vs.

J. D. LANKFORD et al., Defendants.

Præcipe of Complainant for Additional Portions of Record.

The clerk of this court will include in the transcript of the record in this cause on appeal from this court to the Supreme Court of the United States, in addition to the portions of the record designated in præcipe filed by defendants the following:

All of the testimony introduced upon the trial of the cause, a copy of which has been filed herein, approved by the judge of this court.

CHAS. A. LOOMIS,
Solicitor for Complainant.

Service of copy of the above præcipe upon me is acknowledged this 27th day of January, 1914.

JOS. L. HULL, *Ass't Att'y Gen.*,
Solicitor for Defendants.

Endorsed: #1. Platte Iron Wks. vs. J. D. Lankford. Præ- for additional record. Filed Jan. 27, 1914. Arnold C. Dolde, Clerk.

36 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 1.

PLATTE IRON WORKS COMPANY, Complainant,

vs.

J. D. LANKFORD et al., Defendants.

Statement of Facts.

The following testimony was introduced upon the trial of the cause before the court:

Plaintiff offers and reads in evidence a written stipulation between plaintiff and defendant showing a transfer of the certificates of deposit and deposits sued on from E. J. Merkle & Company to plaintiff for value; and showing that the original defendants, Lee Cruce, J. C. McClelland, F. G. Dennis, have been superseded since the commencement of the suit by the present members of the State Banking Board, to-wit, John J. Gerlach, A. D. Kennedy and W. F. Barber, their successors in office; and that the Farmers and Merchants Bank, at Sapulpa, Oklahoma, was duly and legally incorporated as a state bank, with its principal office at Sapulpa, Oklahoma; and the same was taken charge of on September 10th, 1912, by J. D. Lankford, State Bank Commissioner, together with all its assets, who proceeded to wind up its affairs in accordance with the state banking laws of the State of Oklahoma, and has hitherto and to this date continued and remained in full possession and control of the same; and that the plaintiff is a corporation, organized and incorporated under the laws of the State of Maine, and is a citizen of the State of Maine; and that J. D. Lankford, one of the defendants, was at all times herein mentioned, and is the duly qualified and acting Bank Commissioner of the State of Oklahoma.

37 The witnesses C. F. WURTZBERGER, being called by the plaintiff and duly sworn, testified as follows:
That on and prior to September 12, 1912, and at the present time

he was City Treasurer of the City of Sapulpa, Oklahoma, and the Commissioner of Finance, being the legal custodian of the funds of said city. That at that time the funds of the said City were deposited in the Farmers and Merchants Bank and other banks in Sapulpa. That he was City Treasurer at the time of the settlement made between the City of Sapulpa and the Southwestern Engineering Company, who had a contract with said city for the construction of a water-works system. Witness had with him and presented city warrants issued by him as said treasurer to E. J. Merkle & Co. for work done on that job, and also check issued by him as City Treasurer in payment for said warrant. Said warrant was in the usual form, and issued to E. J. Merkle & Co. for \$10,429.16, drawn on the treasurer, with proper endorsements, and a check was issued by him as treasurer of said city payable to the order of E. J. Merkle & Co. for \$10,429.16, drawn on the Farmers and Merchants Bank of Sapulpa, Oklahoma, delivered to L. J. Roach, attorney for E. J. Merkle & Company in payment of said warrant. That the check after having been paid by the bank was returned to him properly endorsed, charged to his account in his bank as treasurer of said city. That this warrant and check were drawn against the water works fund. The witness exhibited a bank book showing deposits and checks as city treasurer, and stated that was his regular bank book, kept in the usual course of business with said bank, showing his deposits and checks therein as city treasurer, which bank book was offered in evidence, and showed on the date of the issuance of the check above mentioned that as city treasurer of said city he then had on deposit in said bank \$28,053.44, and said bank book further showed that the check in question was charged against said Wurtzberger as a
38 debit in said bank book; that said check was paid by the bank and charged to his account and returned to him as a paid check by the bank in the usual course of business; that the bank book showed credits and debits made in the usual course of business in the handwriting of the bank officials. That at the time the bank closed September 10th, 1912, witness had on deposit in said bank \$36,455.00 and some cents. That subsequent to the failure of the bank the State Banking Board settled with the witness on the basis of this bank book as to his deposits.

Cross-examination:

On the day the check was issued to Merkle & Co. the City of Sapulpa settled with all the creditors of the Southwestern Engineering Company and paid out in such settlement by check about thirty three thousand dollars. That on June 8th, witness had on deposit in the water bond fund \$28,053.44, and all checks which were issued to the creditors of the Southwestern Engineering Company on the water works contract were drawn against this fund. That about the time the checks were issued to these creditors there was some trouble arising as to the right of the City to pay these creditors, which was taken up and discussed at the time.

IRA J. ANDERSON was called as a witness by the plaintiff, and being duly sworn, testified as follows:

That on June 8th, 1912, he was, and still is the City Clerk of the City of Sapulpa. That he is the custodian of the city records of the Mayor and Commissioners of said city. Witness presented the record which was offered in evidence showing that on June 8th, 1912, a resolution was introduced and voted upon and adopted authorizing and directing warrant to issue in favor of E. J. Merkle & Co. upon the water works fund for \$10,429.16. Said warrant was read in evidence and witness stated he issued this warrant in accordance with the reso-

39 lution; that the warrant was charged on the books against the City Treasurer the same as other warrants in the usual course of business and was cancelled and returned as other paid warrants.

B. B. BURNETT was called by the plaintiff as a witness, and first being duly sworn, testified as follows:

That on June 8th, 1912, he was cashier of the Farmers and Merchants Bank at Sapulpa; that the check for \$10,429.16, drawn by the City Treasurer of Sapulpa upon that bank, was on that date presented to the bank by L. J. Roach, attorney for E. J. Merkle & Co. for payment and was paid by the bank on that date. That said check was payable to E. J. Merkle & Company or order. That the two certificates of deposit for thirty nine hundred dollars each, sued on in this case, were on that date issued by the bank in part payment of the above check, and the balance of the check was paid in cash. That the transaction occurred in the bank in the City of Sapulpa. That the amount of money which the two certificates of deposit represented remained in the bank and was not taken out of the bank from the time the certificates were issued until the bank closed. The two certificates of deposit were offered in evidence, being Exhibits A and B attached to the second amended bill herein, and same are made a part hereof the same as if incorporated herein.

Cross-examination:

That at the time these checks were presented for payment several other checks of creditors of the Southwestern Engineering Company were also presented by L. J. Roach and no objection was made to paying any of them in cash when they were presented. That shortly before these checks were presented a receivership proceeding against the Southwestern Engineering Company was instituted. Witness did not recall having any conversation with Roach in which the witness stated to Roach that "I caused this receivership proceeding to be filed and I can have it dismissed," if the creditors of the Southwestern Engineering Company would accept payment of their checks in part cash and the balance in certificates of deposit." Witness stated he did not institute the receivership, and was not

40 handling it and no requirement was made by the bank of Mr. Roach with reference to the payment of the checks.

Q. You advised the plaintiff in this suit, Mr. Burgess, to file that petition for a receiver, did you not?

A. I don't know that I did.

Q. Didn't you testify that you did when you were being examined in the bankruptcy court in the Eastern District recently?

A. Well, I am not positive about that, whether I did or not.

Q. It's possible that you advised him to file that suit isn't it?

A. I think I testified over there along this line: that Mr. Burgess was a customer of mine, and this Southwestern Engineering Company owed him some eleven or twelve hundred dollars, and he advised with me about the matter, and thought he was going to lose his money, and he advised with me about how to proceed to get it.

Q. And you advised him to file this suit?

A. I advised him, I think, to file a suit of some kind that would insure him his money.

Q. You advised him to go to Mr. Lawrence, an attorney in Sapulpa, did you not, and get him to look after it for him?

A. I think I sent him to Mr. Lawrence.

Q. Mr. Lawrence is your attorney now, is he not?

A. Yes, in some matters.

Q. Didn't you advise Mr. Burgess later on to dismiss this suit?

A. I advised him, I think, to dismiss it if he got his money.

Q. How long was that after the suit was filed?

A. I don't think it was very long.

Q. About a week?

A. Just a few days.

Q. Meanwhile you had seen Mr. Roach, had you not, with reference to these claims of the creditors?

A. No, sir, I hadn't seen him with reference to any claims. I had seen him around a number of times.

41 Q. This receivership they had instituted over there had the effect of stopping these checks that were being issued by the City to the creditors, did it not?

A. That's my understanding.

Q. Had Mr. Roach been in to see you concerning the action during the time before you advised Mr. Burgess to dismiss?

A. I don't remember whether he had or not.

Q. You don't remember

A. He might have.

Q. What's that?

A. He might have. I am not positive about it.

The witness further testified there were issued several certificates of deposit by the bank in payment of checks of these creditors at that time. He didn't recall just how many. He thought some of the checks were in excess of a thousand dollars and were paid in full. He did not know how many. He recalled that Burgess was one of the creditors whose claim was more than a thousand dollars and whose check was paid in cash in full and he thought the Minnetonka Lumber Company's claim was paid in full for about a thousand dollars; he didn't know whether it was for seven hundred and some odd dollars or not, but thought it was for a thousand. Merkle & Co. was a foreign corporation that had no place of business in Sapulpa and the witness thought they had no certificates of deposit at his bank

prior to that time. Some of the creditors to whom certificates of deposit were issued may have carried accounts at his bank at that time, but he could not name one who did.

Redirect examination:

Witness was shown the bank book of C. J. Wurtzberger and said it was his bank book and the testimony given by Wurtzberger was correct. That this book was kept by the bank and showed his bank account and according to this book he had on deposit on June 8th, 1912, about \$36,000.00. The bank received the amount of 42 the two certificates sued on of thirty nine hundred dollars each out of the check drawn by the City Treasurer, payable to E. J. Merkle & Co. for \$10,429.16.

Recross-examination:

That the check was drawn on his bank and the payment of the check amounted to just a transfer on the records of the bank.

Q. The bank commissioner took charge of the Farmers and Merchants Bank about a couple or three months later, did he not?

A. Yes, sir.

Q. Prior to the time he took charge of the bank it was insolvent, wasn't it?

A. I did not think so.

Q. You didn't think so?

A. No, sir.

Q. You voluntarily turned over the bank to him did you not on the 10th of June?

A. Yes, sir.

Q. September, I mean. No objection made by you to his taking charge?

A. No, sir, objection made by him to taking it. He didn't want it; wanted us to keep running it.

Q. He realized the condition it was in?

A. I don't know.

Q. Did E. J. Merkle & Co. have an account at your bank prior to June 8th 1912?

A. I don't think they had any open account; they might have had an account there at times, but they didn't have any regular account.

Q. They had no general drawing account?

A. No, sir.

The witness further testified:

Q. When you say that money was paid on that check, you don't mean any cash was paid?

A. Yes, there was cash paid on the check.

43 Q. By whom was it paid?

A. Paid by the bank.

Q. By your bank?

A. Yes, sir.

Q. To your bank?

A. Paid by the Farmers and Merchants Bank to Mr. Roach.

Q. Well, the certificates of deposit were issued to Mr. Roach?

A. Yes, the certificates of deposit aggregated about seventy eight hundred dollars and the difference between that and the amount of the check was paid to Mr. Roach; some four or five thousand dollars, three thousand, I believe.

This was all the testimony plaintiff offered, and rested its case.

The defendant called JOHN G. ELLINGHAUSEN, who being duly sworn, testified as follows:

That he is an attorney in Sapulpa, and was called in by the City to advise them in a settlement between the city and the creditors of the Southwestern Engineering Company. He attended a conference between a large number of the creditors and the city officials, and Saturday evening an agreement was reached that the city would pay the creditors upon all of those having claims in excess of a thousand dollars putting up a bond against over payments. This was reached Saturday afternoon prior to June 8th. Mr. Roach was there, and on Monday morning the suit for a receiver instituted by Burgess was filed and that had the effect of stopping the payment of these creditors at that time. The city would not issue the checks until the dismissal of this suit. That Burgess' claim was perhaps eleven hundred dollars, and that they then offered to pay Burgess in full his claim if he would dismiss the receivership action. He refused this offer at this time and gave as his reason——

A. Why, he said that there were some other parties interested in the matter with him and he would have to see them before he could dismiss the action, saying that the matter was practically out of his hands. That the offer was not accepted by Burgess during any
44 of the time the witness was there or had anything to do with this matter.

The defendant called J. D. LANKFORD, who being duly sworn, testified: That he is Bank Commissioner of the State of Oklahoma. That he took charge of the Farmers and Merchants Bank the 9th day of September, 1912. That he has all the books of the Farmers and Merchants Bank of Sapulpa which are made up of accounts which were transferred thirty or sixty days before the time of his taking charge of the bank. That these are the only books of the bank he has. That the records showing all transaction- prior to that time are missing and he has no way of tracing what the transactions of the bank were prior to that time. That the Platte Iron Works Company were given an opportunity to appear before the Board and present their claim upon the certificates of deposit sued on, and did appear and submit their evidence to the board at that time and the board refused payment. The reasons for refusing payment of the claim were——

A. They were not in position to prove the claim, not having access to the books.

Q. Was there any other ground besides that?

A. Well, there had been some certificates of deposit which seemed to have been issued for debts of the officers of the bank; seemed to be such proof made to the banking board.

Q. Out of this bank?

A. Yes, sir.

Q. You stated these certificates you referred to the board had known were issued for the Burnetts personally or this bank?

A. Yes, sir.

Q. And they had no way, did they, of informing the-selves as to what the transactions of that bank were prior to the time of these books that they had showed?

A. They had no way of tracing these transactions, no.

45 Q. And that was the reason, was it?

A. That was the reason of not paying it.

Cross-examination:

Q. I understand you to say that the State Banking Board declined to pay the certificates of deposit sued on in this case because you or the state banking board had no way of ascertaining whether they were valid, legal deposits of that bank?

A. Yes, sir.

Q. That was the reason, was it?

A. Yes, sir.

Q. And if you had been furnished with competent legal proof that these certificates of deposit were issued in due course of business for a valid deposit you would have paid them.

A. That's the purpose of the board.

Q. Well, I say you would have paid them?

A. Yes, sir.

Q. Do you recall who appeared before your board with these two certificates of deposit sued on in this case?

A. I think you did.

Q. I appeared there representing the owners of these certificates of deposit, did I not?

A. Yes, sir.

Q. Do you recall that there was presented to your board and to you personally by me a certified copy of the record of the Commissioners of the City of Sapulpa, Oklahoma covering these transactions?

A. Yes, I remember that.

Q. Please examine the record that is here offered in evidence and say whether the copy furnished you was a certified copy of that record?

A. I think it was.

46 The witness testified further that he did not question the authenticity of this record, nor the statements of fact contained in it. That he accepted it as true. That the bank book of C. J. Wurtzberger, city treasurer, was presented at the time, showing the deposits which he had in the bank at that time and that Wurtzberger appeared and testified before the board to substantially the same facts as testified to by him in this cause, and testified he had on deposit in that bank June 8th, 1912 about \$36,000.00, or a large amount of money in the water works fund. That he showed the bank book showing deposits in the regular course of business and that the witness did not question it. The witness is a banker, expe-

rienced in banking, and that the bank book seems to show on its face to have been made in the usual course of business, and made by accredited officials of the bank, so far as the witness knew.

That the city warrant was also presented to the board payable to Merkle & Co., for \$10,429.16, and testified to by Wurtzberger as being genuine warrant issued in the regular course of business by the City of Sapulpa; and that there was also shown the check of June 8th, 1912 issued by Wurtzberger drawn on the Farmers and Merchants Bank, payable to Merkle & Co. for \$10,429.16, and that the witness heard Wurtzberger testify the check was issued by him in the usual course of business. And that it went into his bank account and was charged back to him in the usual course of business. That he, the witness, did not question that statement, and that he heard him testify when these two certificates were presented that they were part of that check and paid out of it, and that statement was not questioned.

Q. Then please tell the Court upon what basis you reached any conclusion that these certificates of deposit did not represent actual deposits in that bank.

A. The books of the bank itself would be the best evidence.

Q. Isn't this book an original book of entry of the bank?

A. I don't know.

Q. Well, look at it.

A. Seems to be.

47 Q. You are a banker and understand banking and how banking is done, don't you? It purports to have the entries therein made by the officials of the bank itself, doesn't it?

A. It looks that way, yes, sir.

Q. And it purports to be a copy of the original entry of the bank, doesn't it? If the bank books were destroyed, isn't that an original bank book entry?

A. Well, if it was genuine in the first place I would say yes.

Q. Well, you said you didn't question it was not *it* testified to by the owner of it?

A. It looks regular.

Q. A reputable citizen of Sapulpa and the city treasurer?

A. Yes.

Q. You didn't question his integrity, did you?

A. No.

Q. Well, tell us why, if you can, that isn't a legal deposit.

A. Well, it didn't have the books with which to trace the transaction.

Q. Don't this book trace the transaction itself?

A. I don't know whether the original credit was ever made in the bank books or not.

Q. Doesn't this trace the transaction itself?

A. No.

Q. Doesn't it show everything that the bank book would show if you had the bank book?

A. It's supposed to show it.

Q. This book is a copy of the bank book, isn't it, if its a correct book?

A. Yes, sir.

Q. That's all you would get if you got the bank's books, would be a copy of this book?

A. Would be to verify it.

Q. I say you would get a copy of this book, wouldn't you?

A. Yes.

48 Q. Then as I understand you the only reason for not paying this deposit was because the books of the bank are not in your possession. That is correct, isn't it?

A. Because the accounts have not been verified.

Q. I say the only reason you gave why this deposit is not a legal deposit is because you haven't got the bank books to prove it by?

A. Yes, that's true.

Redirect examination:

The witness states the bank books would show more than the individual book shows; would show the cash account, the discount account, and the re-discount account and that you cannot see the whole condition of the bank of of that transaction by looking at that one depositor's book. It was a question whether the city ever really had a deposit on the books of the bank by the banking board. According to the information of the board that money was supposed to go into the city deposit from the sales of bonds, and the board seemed to think it was doubtful if the proceeds of that sale ever went into the assets of the bank. The records which they had of that bank showed it had an unusual amount of outstanding certificates of deposit.

Q. And it was for all of those reasons, taken into consideration altogether, was it not, that this particular claim was turned down?

A. Yes, that had something to do with it.

Q. You don't know this book was genuine?

A. No, I don't know.

Q. All you can say is that it purports to be a deposit book?

A. Looks to be, seems to be.

Recross-examination.

The witness testified he, as State Bank Commissioner, paid Wurtzberger the amount of money this book shows he had on deposit there.

Q. Then why do you tell this court that isn't just as good evidence of Merkle's deposit as this is of Wurtzberger's deposit?

49 A. Well, the board thought that the fraudulent transactions was in the certificates of deposit.

Q. The water fund was created by the sale of a bond issue, wasn't it?

A. I think so.

Q. And if you owned Wurtzberger any money under that water bond fund it was acquired by the sale of these bonds?

A. Yes.

Q. Then why did you pay Wurtzberger the money out of that fund as shown by this book of the bank?

A. Well, the board advised it.

Redirect examination:

The board had no reason to doubt the water fund subsequent to June 8th had been increased according to the way that book shows it did. It was the deposits prior to June 8th, which were checked out by these checks that they had heard rumors with reference to.

Recross-examination:

Q. Do I understand you to say or to claim that any part of the funds arising from the sale of the bonds didn't go into that assets?

A. No, sir, you don't understand me to say that.

Q. Well, is it true?

A. I don't know.

Q. Didn't you investigate and find out whether Wurtzberger as city treasurer received and accounted for every dollar of this and didn't I furnish you with certified copy of the check that paid for these bonds by Sullivan and Company in Kansas City and didn't you use that for the purpose of checking up and finding out whether the money went in there or not? Don't you recall that, sir?

A. I don't just recall that; probably you did.

Q. And didn't you take it up with Wurtzberger and find out where the water bond fund was created and how it was created?

A. No, I didn't.

Q. And after you did that didn't you pay him exactly to the cent what this book shows was due him?

50

A. I think he has been paid all except some coupons.

The defendant called L. J. ROACH, who being duly sworn, testified as follows:

That he was a practicing attorney at Muskogee and represented E. J. Merkle & Co. in the matter of the settlement of this claim against the Southwestern Engineering Company. Merkle was present personally at the conference referred to by the witness Ellinghausen. When the check of \$10,429.16 was issued by the city to Merkle, it was delivered to him, the witness, who at that time represented several other creditors in this matter. He presented the check in question to Bates Burnett at the Farmers and Merchants Bank and received therefor in payment two certificates of deposit sued on here and the balance in cash. About four creditors witness represented had claims exceeding a thousand dollars and on these he received 25% in cash and balance in certificates of deposit. Perhaps on one he received 33 1/3% cash. None of his clients were residents of Oklahoma. The order of appointment of the receiver in the suit filed by Burgess reached the treasurer's office in the city of Sapulpa early Monday morning, the time when creditors were gathering there expecting to get their money. The city then refused to issue the checks to the creditors. Witness was not acquainted with

Burnett at the time and had no conversation with him with reference to the receivership suit for three or four days thereafter. He had no agreement with Burnett during the latter part of the week that the suit should be dismissed. Burnett told witness he had no control of the suit. Told him that he had nothing to do with it and that he didn't know whether anything could be done with it or not.

Q. Why did you receive payment of the checks for your clients in this manner?

A. In this particular case I accepted 25% in cash and the balance in certificates of deposit because Merkle, my client, instructed me that that would be satisfactory. I communicated with him
51 by telephone.

Q. Weren't you forced to receive it that way or not get it at all?

A. No, sir.

Q. You were not?

A. No, sir.

The defendant here rested its case.

The plaintiff recalled C. F. WURTZBERGER who testified: That the water fund was created by the sale of bonds by the City. The water works bonds were paid for in cash by J. R. Sullivan & Company of Kansas City and the money deposited in the Farmers and Merchants Bank this fund remaining in that bank to the account of the city treasurer until it was checked out in the usual course of business. The money on deposit to the credit of that fund as heretofore testified was on June 8th, 1912, a part of that fund.

Witness gave the state banking board full information in regard to this water works fund after the bank closed and the impression got out the fund had no money in the bank. Witness went to Garnett, who was in charge of the bank for the state banking board, and showed him his books and gave him full information which he did not question. Neither the state banking board nor J. D. Lankford ever questioned the information afterwards and settled with the witness on the basis of the information furnished, which is in accordance with the testimony heretofore given by this witness.

Cross-examination :

Q. Witness does not know of his own knowledge the actual money arising from the sale of these bonds went into the bank. I know that I got credit there on this account.

52 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Plaintiff,
vs.

J. D. LANKFORD, Bank Commissioner, et al., Defendants.

The foregoing statement of the evidence was presented in behalf of the plaintiff for approval, January 27, 1914, the plaintiff appearing at the time by Charles A. Loomis, its attorney, and the defendants appearing at the time by their attorney, Jos. L. Hull, Assistant Attorney General, and thereupon the objection of the defendants to the inclusion of the evidence in the transcript of the record was overruled.

Thereupon the defendants objected to said statement of the evidence for the reason that the same does not include a letter offered in evidence as an exhibit to the testimony of the witness L. J. Roach and excluded at the trial by the court; and said objection was overruled.

It is now ordered that the foregoing statement of the evidence be and it is hereby approved as true and complete and properly prepared as a part of the record for the purposes of the appeal in this cause.

February 16, 1914.

JOHN H. COTTERAL,

Judge U. S. District Court, Western District of Oklahoma.

Endorsed: No. 1. Platte Iron Works vs. J. D. Lankford, et al. Condensed Statement of Evidence. Lodged in Clerk's office Jan. 27, 1914. Arnold C. Dolde, Clerk. Filed Feb'y 16, 1914. Arnold C. Dolde, Clerk By M. V. Haws, Deputy.

53 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 1.

THE PLATTE IRON WORKS COMPANY, a Corporation, Complainant,
vs.

J. D. LANKFORD, Bank Commissioner; JOHN J. GERLACH, W. F. Barber, and A. D. Kennedy, Composing the Oklahoma State Banking Board, Defendants.

Bond.

Know all men by these presents: That we, J. D. Lankford, as Bank Commissioner of the State of Oklahoma, and John J. Gerlach, W. F. Barber and A. D. Kennedy, as members of the State Banking Board

and Colin S. Campbell and R. C. Stuart, as sureties, acknowledge ourselves to be jointly indebted to the Platte Iron Works Company, a corporation, appellee, in the above cause, in the sum of \$500.00, conditioned:

That whereas, on the 7th day of January, A. D. 1914, in the District Court of the United States for the Western District of Oklahoma, in a suit pending in that court, wherein the Platte Iron Works Company was plaintiff and J. D. Lankford, John J. Gerlach, W. F. Barber and A. D. Kennedy were defendants, appearing on Equity Docket as Number One, a decree was rendered against the said J. D. Lankford, as Bank Commissioner of the State of Oklahoma, and John J. Gerlach, W. F. Barber and A. D. Kennedy, as members of the Oklahoma State Banking Board, and said defendants having obtained an appeal to the Supreme Court of the United States and a citation directed to the said The Platte Iron Works Company, a corporation, citing and admonishing it to be and appear in the Supreme Court of the United States within thirty days after issuance thereof.

Now if the said J. D. Lankford, as Bank Commissioner and John J. Gerlach, W. F. Barber, and A. D. Kennedy, as members of the Oklahoma State Banking Board shall prosecute their appeal to effect, and answer all costs of they fail to make their plea good, then the above obligation to be void, else to remain in full force and effect.

J. D. LANKFORD,

As Bank Commissioner of the State of Oklahoma.

W. F. BARBER,

JOHN J. GERLACH,

A. D. KENNEDY,

As Members of the Oklahoma State Banking Board,

Principals.

COLIN S. CAMPBELL,

R. C. STUART,

Sureties.

Approved this 6th day of February, 1914.

JOHN H. COTTERAL,

Judge United States District Court.

Endorsed: In Equity. No. One. In the District Court of the United States for the Western District of Oklahoma. The Platte Iron Works Company, a corporation, Complainant, vs. J. D. Lankford, Bank Commissioner, John J. Gerlach, W. F. Barber, A. D. Kennedy, composing the Oklahoma State Banking Board, Defendants. Bond. Filed Feb'y 6, 1914. Arnold C. Dolde, Clerk. By M. V. Haws, Deputy.

55 UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, Clerk of the District Court of the United States of America, for the Western District of Oklahoma, do hereby certify the foregoing to be a full, true and complete transcript of the plead-

ings, record and proceedings in said court in case No. 1, wherein The Platte Iron Works Company, a corporation is plaintiff, and J. D. Lankford, et al., are defendants, as full, true and complete as the said transcript purports to contain and as called for by the præcipe for transcript of the record above set forth.

I further certify that the original citation is hereto attached and **returned herewith.**

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Guthrie in said District, this 19th day of February, A. D. 1914.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk United States District Court,
Western District of Oklahoma,
By M. V. HAWS, *Deputy.*

Endorsed on cover: File No. 24,080. W. Oklahoma D. C. U. S. Term No. 929. J. D. Lankford, John J. Gerlach, W. F. Barber, and A. D. Kennedy, composing the state banking board of the State of Oklahoma, appellants, vs. Platte Iron Works Company. Filed March 5th, 1914. File No. 24,080.

Office Supreme Court, U. S.

FILED

MAR 19 1914

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1913.

J. D. Lankford, Bank Commissioner
of the State of Oklahoma, et al.,
Appellants,

vs.

Platte Iron Works Company,
a Corporation,
Appellee.

No. **381**

APPLICATION TO ADVANCE.

CHAS. WEST,
Attorney General of Oklahoma,
Solicitor for Appellants.



THE HARLOW-RATLIFF PRINTING CO., OKLA. CITY



IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1913.

J. D. Lankford, Bank Commissioner
of the State of Oklahoma, et al.,
Appellants,

vs.

Platte Iron Works Company,
a Corporation,
Appellee.

} No. 929.

APPLICATION TO ADVANCE.

Come the appellants by their solicitor, Chas.
West, Attorney General of the State of Oklahoma,
and pray the Court to advance this appeal for ar-
gument and submission.

THE CASE

Appellee seeks to compel appellants in their official capacity to pay an alleged deposit in a failed state bank, out of the Depositors Guaranty Fund of the State of Oklahoma, or a warrant in lieu. Appellants are the Banking Board and State Bank Commissioner, and object to the order made because:

1. Judicial compulsion set in motion against appellants as agents of the State as to the disposition of the State's property is an action against the state without its consent because the fund is a state fund.

2. Because the Court's order to pay or draw a warrant is one of mandamus allowed when the same is not ancillary to a judgment already obtained.

3. The law gives no justiciable right to a depositor to sue the appellants but appellants' acts thereunder are governmental acts within their administrative discretion.

4. Whether appellee is a depositor is a mixed question of law and fact and the appellants' determination thereof can only be set aside upon allegations of fraud, such as are not contained in the bill.

REASONS FOR ADVANCING.

The questions involved are of great public importance to the people of Oklahoma, and particularly to the Banking Department. Numerous causes are pending involving the questions in this appeal, in which the interference by the courts with the administration of the Depositors' Guaranty Fund is sought. This seriously impairs the efficiency of the administration of the fund, not only by reason of the great expense for defending these cases, but also because of the loss of public confidence in the effectiveness of the Guaranty Fund Law, which so much litigation naturally causes. Furthermore, owing to contradictory decisions of the lower courts, there is much doubt and confusion regarding the duty of appellants in administering the fund. For instance, the United States District Court for the Eastern District of Oklahoma has held just the reverse of the decision in this cause. The following cases will be determined by a finding in this cause that this suit is prohibited by the Eleventh Amendment.

In the Federal Court for the Western District of Oklahoma:

J. E. Ledbetter, Guardian, v. Lankford et al.;

First Nat. Bank of Carthage v. Lankford, et al.;

First Nat. Bank of Joplin v. Lankford et al.;

William Wallace v. Lankford et al.;

T. C. Hayden v. Lankford et al.;

Thos. J. Roney, Admr., v. Lankford et al.

In the Federal Court for the Eastern District of Oklahoma there are two cases involving this question, to-wit:

American Water Softener Co. v. Lankford et al.;

Farrish v. Lankford et al.

And the following cases involving similar questions pending in the Supreme Court of Oklahoma:

Schroeder v. Lankford et al.;

Okla. Bankers Trust Co. v. Lankford et al (2 cases);

** Lovett et al v. Lankford et al.*

The defense of all of these actions requires the

expenditure of large sums besides constant attention from the officers of the State.

THE LEGAL QUESTIONS INVOLVED.

1. The determination of whether or not plaintiff was a depositor, entitled to share in the Depositors Guaranty Fund involves the exercise of official discretion, with which the courts will not interfere.

Decatur v. Paulding, 14 Pet. 497; 10 L. Ed. 559;

U. S. v. Guthrie, 17 How. 284; 15 L. Ed. 10.

2. A transferee of a time certificate of deposit is not a depositor.

Magee on Banks and Banking, 371-3.

3. This fund being a state fund (*State v. Cockrell*, 27 Okla. 630, 112 Pac. 1000; *People v. Walker*, 21 Barb. 630, 642) the state having a lien upon the assets of a failed bank for its benefit (*Lankford v. Okla. Eng. & Ptg. Co.*, 35 Okla. 404; 130 Pac. 278) an action to compel payment out of it by the officers in charge thereof, is one against the State of Oklahoma without its consent.

Smith v. Reeves, 178 U. S. 436;

Murray v. Wilson Distilling Co., 212 U. S. 151;

In re Ayres, 123 U. S. 443;

Louisiana v. Jumel, 107 U. S. 711;

Cunningham v. Macon & B. Ry. Co., 109 U. S. 446;

Pennoyer v. McConnaughty, 140 U. S. 1.

4. The action is one for mandamus not ancillary to judgment rendered. The prayer of the bill of complaint is as follows:

“In consideration whereof, for as much as the plaintiff is remedyless in the premises, and is by the strict rules of common law, only relievable in a court of equity, where matters of thiss nature are cognizable, the plaintiff prays that upon a final hearing of this cause, a decree be entered herein, ordering, adjudging and decreeing that the plaintiff is the owner of, and entitled to the said deposit, and interest thereon, and is entitled to have the same paid out of the Depositors Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma, and in the possession and under the supervision and management of the State Banking Board of the State of Oklahoma, composed of John J. Gerlach, A. D. Kennedy and W. F. Barber defendants herein; and in case the depositors Guaranty Fund on hand is insufficient to pay the depositors of said bank, and other indebtedness chargeable against same, this plaintiff be and is entitled to have issued to plain-

tiff certificate of indebtedness to be known as "Depositors Guaranty Fund warrants of the State of Oklahoma" to liquidate said deposit and said certificates of deposit; and the said John J. Gerlach, A. D. Kennedy and W. F. Barber, composing said State Banking Board of the State of Oklahoma, be ordered, commanded and required to pay said deposit and interest thereon, out of the Depositors Guaranty Fund, and if there are not sufficient funds in the Depositors Guaranty Fund available therefor, that the said State Banking Board be ordered, commanded and required to issue to plaintiffs certificate of indebtedness for the amount of such certificates of deposit, to be known at "Depositors Guaranty Fund Warrants of the state of Oklahoma" bearing six per cent interest as provided by Section 3 of Article 2, of Chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last Session of the State Legislature of the State of Oklahoma; and that said John J. Gerlach, A. D. Kennedy and W. F. Barber, composing the State Banking Board, be ordered, commanded and required to levy an assessment against each and every bank and trust company organized and existing under the laws of the State of Oklahoma, for the purposes of increasing such depositors guaranty fund and paying said deposit, and said certificates of indebtedness, known as "Depositors Guaranty Fund Warrants of the State of Oklahoma" and for such other and further relief as shall seem meet and agreeable in equity and good conscience."

And the decree rendered thereon is as follows:

"Now on this 7th day of January, 1914, this cause coming on to be heard, upon the second amended bill of complaint of the plaintiff, and the answer of the defendants; the parties appearing in person and by their attorneys, and all and singular the matters in issue were submitted to the court, and the court having heard the evidence and being fully advised in the premises;

It was ordered, adjudged and decreed by the Court that on June 8th, 1912 E. J. Merkle & Company deposited in the Farmers & Merchants Bank of Sapulpa, Oklahoma, seventy-eight hundred Dollars (\$7,800.00) and accepted and received from said bank as evidence of said deposit the two certificates of deposit described in the first and second counts of plaintiff's second amended bill of complaint, and that thereafter and before the maturity of said certificates of deposit the plaintiff acquired said deposits and said certificates of deposit from said E. J. Merkle & Company by purchase for value, and is now the owner and holder of said deposits and said certificates of deposit.

The Court further finds, adjudges and decrees that the plaintiff as holder and owner of said deposits and said certificates of deposit, is entitled to have said deposits and said certificates of deposit allowed by the State Banking Board of the State of Oklahoma as a valid claim against the depositors guaranty fund of the State of Oklahoma, and is entitled to have said deposits paid out of the depositors guaranty fund of the State of Oklahoma on an equal basis with all depositors of failed banks in said State, and if at any time the depositors guar-

anty fund on hand shall be insufficient to pay the depositors of failed banks, or other indebtedness properly chargeable against the same that plaintiff be and is entitled to have the State Banking Board of Oklahoma issue to plaintiffs certificates of indebtedness to be known as 'depositors guaranty fund warrants of the State of Oklahoma,' and that plaintiff is entitled to interest on said certificates of deposit at three per cent per annum until September 10, 1912, and six per cent per annum thereafter to this date.

It is further ordered, adjudged and decreed by the Court that plaintiff have and recover of and from the defendants J. D. Lankford, John J. Gerlach, A. D. Kennedy and W. F. Barber, as members of the State Banking Board of the State of Oklahoma, the sum of \$4,241.25 on the first count in plaintiff's second amended bill of complaint, and that the same be paid out of and from the depositor's guaranty fund of the State of Oklahoma. And if the depositor's guaranty fund on hand shall be insufficient to pay the depositors of failed banks, or other indebtedness properly chargeable against it then by a certificate of indebtedness known as 'depositor's guaranty fund warrants of the State of Oklahoma' sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

It is further ordered, adjudged and decreed by the Court that plaintiff have and recover of and from the defendant, J. D. Lankford, John J. Gerlach, A. D. Kennedy and W. F. Barber, as members of the Banking Board of the State

of Oklahoma, the sum of \$4,241.25 on the second count of plaintiff's second amended bill of complaint, and that the same be paid out of the depositor's guaranty fund of the State of Oklahoma. And if the depositor's guaranty fund on hand shall be insufficient to pay the depositors of failed banks, or other indebtedness properly chargeable against it, then by certificate of indebtedness known as 'depositor's guaranty fund warrants of the State of Oklahoma' sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

It is further ordered, adjudged and decreed that the plaintiff recover of and from the defendants J. D. Lankford, John J. Gertach, A. D. Kennedy and W. F. Barber, as members of the State Banking Board, its costs in this action."

This in effect is mandamus.

Farmers Nat. Bank v. Jones, 105 Fed. 459.

The lower courts had no jurisdiction thereof.

U. S. ex rel Knapp v. Lakeshore & M. S. Ry. Co., 197 U. S. 540, 49 L. Ed. 870;

Covington etc. Bridge Co. v. Hager, 203 U. S. 109, 51 L. Ed. 112.

Respectfully submitted,

CHAS. WEST,
Attorney General of Oklahoma,
Solicitor for Appellants.

IN THE SUPREME COURT OF THE UNITED
STATES.

J. D. LANKFORD, et al,
Appellants,
vs.

THE PLATTE IRON WORKS COMPANY,
a Corporation,
Appellee.

To the Platte Iron Works Company, a corporation,
Appellee:

Notice is hereby given you that the foregoing application to advance this cause for argument and submission, will be submitted to the Supreme Court upon the second Monday after the date of this motion.

CHAS. WEST,
Attorney General of Oklahoma,
Solicitor for Appellants.

Service of the foregoing notice, and receipt of copy thereof, and of foregoing motion to advance, is hereby acknowledged this ——— day of March, 1914.

.....
Solicitor for Appellee.

IN THE
SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM 1914

J. D. Landford, John J. Gerlach, W. F.
Barber, and A. D. Kennedy Composing
The State Banking Board of the
State of Oklahoma.

Appellants

Platte Iron Works Company, a Cor-
poration.

Appellee

Brief on Behalf of Appellants

Appeal from United States District Court
for Western District of Oklahoma

CHAS. WEST

Attorney General of Oklahoma
Defender for Appellants

Service of this Brief completed this _____ day of _____
1914.

Witness my hand and seal

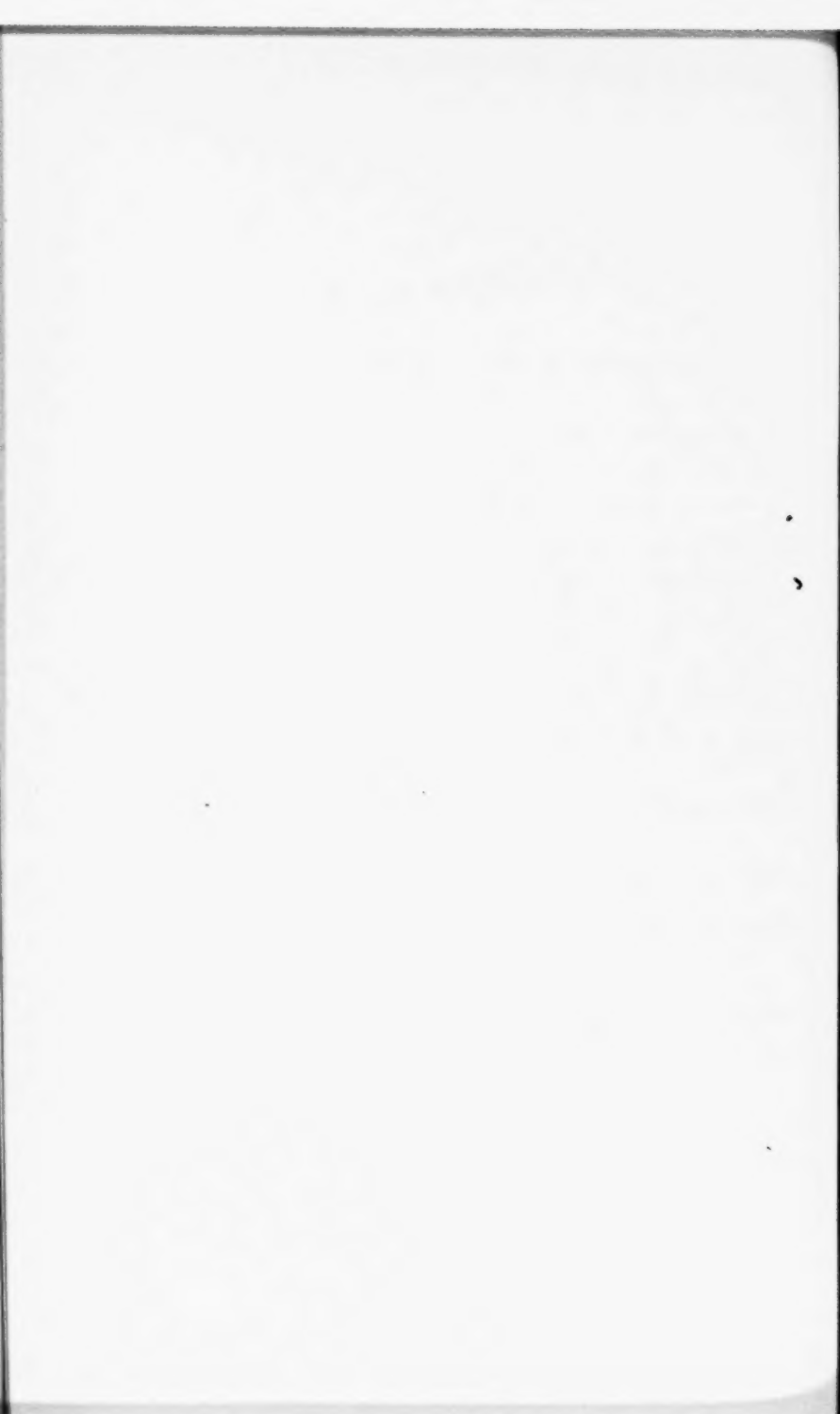
INDEX TO SUBJECTS.

	Pages
Statement of The Case_____	6
Proceedings in the Case_____	7
Specifications of Error_____	14
Argument, _____	16
The Oklahoma Bank Guaranty Law_____	16
The Action is Against the State of Oklahoma_	19
The Action is for Mandamus, not Ancillary to the prior judgment_____	27
The Petition Sets Forth no Cause of Action__	31

INDEX TO CASES CITED.

	Pages.
Ayres, In Re, 123 U. S. 443-----	25
Burnham vs. Fields, 157 Fed. 248-----	30
Covington etc. Bridge Co. vs. Hager 203 U. S. 109.-----	29
Cunningham vs. Macon & Brunswick Ry. Co. 109 U. S. 446-----	25
Decatur vs. Paulding, 14 Pet. 497, 10 L. Ed. 559-----	23
Denton vs. Barber, 79 Fed. 189, 24 C. C. A. 476-----	30
Farmers National Bank vs. Jones, 105 Fed. 459-----	29
Fuller vs. Aylesworth, 75 Fed. 694, 21 C. C. A. 509-----	30
Forsyth, In Re, 78 Fed. 301-----	30
Gares vs. Northwest, Nat. Bldg. Assn. 55 Fed. 210-----	30
Governor of Georgia vs. Madrazo, 1 Pet.110_	24
Indians vs. Lake Erie etc. Ry. 85 Fed. 3_	30
Jabine vs. Oats. 115 Fed. 861-----	30
Lankford vs. Okla. Eng. Co. 130 Pac. 278_	20
Louisiana vs. Jumel, 107, U. S. 711-----	25
Large vs. Consul & Nat. Bank, 137 Fed. 168_	30
Magee on Banks and Banking-----	31

Murray vs. Wilson Distilling Co. 213 U. S. 150-----	25
Noble State Bank vs. Haskell, 219 U. S. 104-----	16-21
Pensacola vs. Lehman, 57 Fed. 324, 6 C. C. A. 349-----	30
Pennoyer vs. McConnaughy, 140 U. S. 1-----	25
Provisions of the Oklahoma Bank Guar- anty Law.	
Sec. 1, Ch. 22 Session Laws, 1913, p. 23-----	17-22
Sec. 3, Ch. 22, Session Laws 1913, p. 27-----	17
Sec. 4, Ch. 22, Session Laws, 1913, p. 29-----	18
Section 303, Rev. Laws of Oklahoma, 1910-----	18
State vs. Cockrell, 27 Okla. 630, 112 Pac. 1000-----	20
Smith vs. Reeves, 178 U. S. 436-----	24
U. S. ex. rel. Knapp vs. Lake Shore & M. So. Ry. Co. 197 U. S. 540, 49 L. Ed. 870-----	29
Wiemer vs. Louisville Water Co. 130 Fed. 246-----	30



IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1914

Brief on Behalf of Appellants

J. D. Lankford, John J. Gerlach, W. F. Barber, and A. D. Kennedy, composing The State Banking Board of the State of Oklahoma,
Appellants

vs.

Platte Iron Works Company, a Corporation,
Appellee

Appeal from United States District Court For Western District of Oklahoma.

CHAS. WEST,
Attorney General of Oklahoma.
Solicitor for Appellants.

THE CASE

There are three questions:

1. Is not a proceeding an original one in mandamus and thus beyond the jurisdiction of the lower court where the bill seeks a judgment against the members of the State Banking Board of Oklahoma *together with an order to pay same out of the Guaranty Fund of the State?*

2. May the State be sued by a depositor in a failed bank? Is not a suit against the Banking Board one against the State?

3. Is not the determination of who are in fact depositors in a failed bank a question of discretion in the Bank Commissioner of the State and as such beyond judicial control? Does the possession of a certificate of deposit preclude the board from determining that the particular holder was a creditor of the bank for a loan made it rather than a depositor within the protection of the guaranty law?

PROCEEDINGS IN THE CASE.

This cause was commenced in the District Court of the United States for the Western District of Oklahoma by the filing of a petition on the equity side of the court.

It is alleged in the bill that the plaintiff, the Platte Iron Works Company, a corporation, a citizen of Maine, is the transferee and holder of two certain time certificates of deposit issued by the Farmers & Merchants Bank of Sapulpa, Oklahoma, a State Bank, organized under the Oklahoma Banking Laws; that the defendants are members of the Oklahoma State Banking Board, and the defendant, J. D. Lankford is the State Bank Commissioner; that on September 10, 1912, the Bank Commissioner took charge of the Farmers & Merchants Bank of Sapulpa, and all of its assets and proceeded to wind up its affairs; that the plaintiff's certificates of deposit have not been paid; and that although demand has been made upon the State Banking Board and the State Bank Commissioner to pay the same out of the Depositor's Guaranty Fund of the State of Oklahoma, they have refused to do so, although it was their duty so to do.

The prayer of the bill is: "That upon a final hearing of this cause, a decree be entered

herein ordering, adjudging and decreeing that the plaintiff is the owner of, and entitled to the said deposit and certificate of deposit and interest thereon, and is entitled to have the same paid out of the Depositors' Guaranty Fund, created under and by virtue of the laws of the State of Oklahoma, and in the possession and under the supervision and management of the State Banking Board of the State of Oklahoma, composed of John J. Gerlach, A. D. Kennedy, and W. F. Barber, defendants herein; and in case the Depositors' Guaranty Fund on hand is insufficient to pay the depositors of said bank, and other indebtedness, chargeable against same, that plaintiff be and is entitled to have issued to plaintiff certificates of indebtedness, to be known as 'Depositors Guaranty Fund Warrants of the State of Oklahoma,' to liquidate said deposit, and said certificate of deposit; and that said John J. Gerlach, A. D. Kennedy, and W. F. Barber, composing said State Banking Board of the State of Oklahoma, be ordered, commanded and required to issue to plaintiff certificates of indebtedness for the amount of such certificate of deposit, to be known as "Depositors Guaranty Fund Warrants of the State of Oklahoma," bearing six per cent interest, as provided by Section 3 of Article 2, of Chapter 31, Session Laws of Oklahoma, 1911, as amend-

ed by Senate Bill No. 231, passed at the last session of the State Legislature of the State of Oklahoma; and that said John J. Gerlach, A. D. Kennedy and W. F. Barber, composing the State Banking Board be ordered, commanded and required to levy an assessment against the Capital Stock of each and every bank and trust company organized and existing under the laws of the State of Oklahoma, for the purpose of increasing such Depositors' Guaranty Fund, and paying said deposit, and said certificates of indebtedness, known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' and for such other and further relief as shall seem meet and agreeable in equity and good conscience"

(See pages 8 and 9 of Transcript of Record).

A motion to dismiss this bill was filed by the defendants alleging: "*That the court has no jurisdiction of the subject of the action on the persons of the defendants, said suit being one against the State of Oklahoma without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States.*" (See page 11 of Transcript of record).

This motion, the court overruled; to which order the defendants excepted. (See page 12, Transcript of record).

On January 7, 1914, the court rendered a final decree against the defendants which is as follows:

"Now, on this 7th day of January, 1914, this cause coming on to be heard upon the second amended bill of complaint of the plaintiff, and the answer of the defendants; the parties appearing in person and by their attorneys, and all and singular the matters in issue were submitted to the court and the court having heard the evidence, and being fully advised in the premises;

"It was ordered, adjudged and decreed by the court that on June 8th, 1912, E. J. Merkle & Company, deposited in the Farmers & Merchants Bank of Sapulpa, Oklahoma, Seventy-eight Hundred Dollars (\$7,800.00) and accepted and received from said Bank, as evidence of said deposit the two certificates of deposit, described in the first and second counts of plaintiff's second amended bill of complaint; and that thereafter, and before the maturity of said Certificates of Deposit, the plaintiff acquired said deposits and said certificates of deposit from said E. J. Merkle & Company, by purchase, for value, and is now the owner and holder of said deposits and said certificates of deposit.

"The court further finds, adjudges and decrees that plaintiff as the holder and owner of said deposits and said certificates of deposit, be and is entitled to have said deposits and said certificates of deposit allowed by the state banking board of the state of Oklahoma, as a valid claim against the depositors' guaranty fund of the state of Oklahoma, and is entitled to have said deposits paid out of the depositors guaranty fund of the State of Oklahoma, and is entitled to have said deposits paid out of the depositors' guaranty fund of the State of Oklahoma, on an equal basis with all depositors of failed banks in said state and if at any time the depositors' guaranty fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against the same, that plaintiff be and is entitled to have the state banking board of Oklahoma issue to plaintiff certificates of indebtedness to be known as 'Depositors' Guaranty Fund Warrants, of the State of Oklahoma,' and that plaintiff is entitled to interest on said certificates of deposit, at three per cent per annum until September 10, 1912, and six per cent per annum thereafter to this date.

"It is further ordered, adjudged, and decreed by the court that plaintiff have and recov-

er of and from the defendants, J. D. Lankford, John J. Gerlach, A. D. Kennedy, and W. F. Barber as members of the state Banking Board of the State of Oklahoma the sum of \$4,241.25 on the first count in plaintiff's second amended bill of complaint, AND THAT THE SAME BE PAID OUT OF AND FROM THE DEPOSITORS' GUARANTY FUND OF THE STATE OF OKLAHOMA. And if the depositors' guaranty fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against it, then by a certificate of indebtedness known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

"It is further ordered, adjudged, and decreed by the court that plaintiff have and recover of and from the defendants, J. D. Lankford, John J. Gerlach, A. D. Kennedy, and W. F. Barber, as members of the State Banking Board of the State of Oklahoma the sum of \$4,241.25 on the second count of plaintiff's second amended bill of complaint, and that the same be paid out of the depositors' guaranty fund of the State of Oklahoma. And if the depositors' guaranty

fund on hand shall be insufficient to pay the depositors of failed banks or other indebtedness properly chargeable against it, then by a certificate of indebtedness known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' sufficient to liquidate the amount of this judgment, and bearing interest at the rate of six per cent per annum from the date hereof.

It is further ordered, adjudged and decreed that the plaintiff recover of and from the defendants, J. D. Lankford, John J. Gerlach, A. D. Kennedy and W. F. Barber, as members of the State Banking Board its cost in this action.

JOHN H. COTTERAL, Judge."

From this decree, appeal was taken to this court. The court below over appellants' objection (See Transcript of record, page 30), ordered the evidence introduced on final hearing, included in the record. But it is needless to consider same, since the assignments of error go solely to the sufficiency of the bill, and the jurisdiction of the court.

SPECIFICATIONS OF ERROR.

First: The court erred in overruling defendant's Motion to Dismiss for the following reasons, to-wit:

1. That said suit was an original action for mandamus, of which said court had no jurisdiction, the same not being ancillary to any judgment theretofore obtained.

2. Because said suit was in fact against the State of Oklahoma to which it had not given its consent and as such it was prohibited by the eleventh amendment to the Constitution of the United States, the defendants having no personal interest therein and being sued in their official capacity as agents of said state, all of which appeared on the face of the bill of complaint.

Second: The court erred in rendering final judgment in said action for the following reasons:

1. That said suit was an original action in mandamus, of which said court had no jurisdiction, the same not being ancillary to any judgment heretofore obtained.

2. Because said suit was in fact against the State of Oklahoma to which it had not given

en its consent, and as such it was prohibited by the eleventh Amendment to the Constitution of the United States, the defendants having no personal interest therein and being sued in their official capacity as agents of said State, all of which appeared on the face of the bill of complaint.

3. Because the second Amended bill upon its face stated no cause of action for the relief sought, or for any relief. (See pages 16 and 17 of Transcript of Record).

ARGUMENT

The Oklahoma Bank Guaranty Law

In 1907-8 the Oklahoma law was enacted creating a fund for the payment of depositors of failed banks. This fund was created by levying an assessment against all State Banks in Oklahoma. The validity of this law was questioned and this court held it a proper exercise of the police power of the State. *Noble State Bank vs. Haskell*, 219 U. S. 104.

The provisions of the law necessary to be considered in this cause are the following:

"The Banking Board shall be composed of the Bank Commissioner and three other persons, which persons shall be appointed by the Governor, by and with the advice and consent of the Senate, no one of whom shall be an officer or director in a National Bank. * * *

* * * * The members of the board, other than the Bank Commissioner, shall receive no compensation for their services, and they shall be paid their actual and necessary expenses incurred in the performance of their duties, the same to be paid out of the General Revenue Fund. The Bank Commissioner shall be chairman of said board. Said board shall have the

supervision and control of the Depositors' Guaranty Fund, and shall have the power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of said fund.* * * * *

(Sec. 1, Ch. 22, Session Laws, 1913, p. 23).

"There is hereby levied against the capital stock of each and every bank organized and existing under the laws of this State an annual assessment equal to one-fifth of one per cent, and no more, of its average daily deposits during its continuance as a banking corporation for the purpose of creating a depositors' Guaranty Fund; * * * * * Such fund so created shall be known as the Depositors' Guaranty Fund of the State of Oklahoma, and shall be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in this act."

(Sec. 3, Ch. 22, Sess. Laws 1913, p. 27).

"If at any time the Depositors' Guaranty Fund on hand shall be insufficient to pay the depositors of failed banks, or other indebtedness properly chargeable against the same, the Banking Board shall have authority to issue certificates of indebtedness to be known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' in order to liquidate the deposits

of failed banks or any other indebtedness properly chargeable against said Depositors' Guaranty Fund."

(Id. p. 29.)

Section 303, Rev. Laws of Oklahoma, 1910, provides:

"In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

The section 300 referred to in the forego-

ing was amended in 1913, so as to read as quoted above from Sec. 3, Ch. 22, Session Laws 1913.

THE ACTION IS AGAINST THE STATE OF OKLAHOMA.

It will be noticed that defendants are sued in their official capacity. The relief sought is such as could only be granted against them as officials of the State of Oklahoma. They have no personal interest in the litigation. Were they not officers of the State they could not in any way comply with the decree rendered. The bill seeks payment of the plaintiff's claim out of the Depositors' Guaranty Fund of the State of Oklahoma; and the prayer is for an order *compelling these State officers, having the control and management of this fund to pay the same out of this fund*, or if the cash available be insufficient to issue Depositors' Guaranty Fund Warrants in payment of same.

The Supreme Court of Oklahoma in construing the banking law, held, (1) that the Depositors' Guaranty Fund is a fund of the State, and (2) that the state had a first lien on the failed bank's assets to discharge whatever the State should advance for it.

(1). It said: "That the depositors' guaranty fund and the funds of a failed bank in the hands of a bank commissioner for the purpose of reimbursing the depositors' guaranty fund, is as much a fund of the state as the common school fund is also true."

State vs. Cockrell, 27 Okla. 630; 112 Pac. 1000.

(2). And further, that the state has a first lien upon the assets of a defunct bank for the benefit of the Depositors' Guaranty Fund, by virtue of Sec. 303, Rev. Laws of Oklahoma, 1910 (above quoted) and the effect of this statute is to make the State a preferred creditor until any deficiency created therefrom by payment of depositors is made up.

Lankford vs. Oklahoma Engraving Co.,
130 Pac. 278.

So, we have in this case an effort to compel State officials, having the control and management of a fund of the State, to pay a claim which they have already refused to pay, either out of that fund, or by certificates of indebtedness issued under authority of the State.

In answer it is the contention of appellants that this law did not establish a contractual relation as between the Bank Commissioner, or the Banking Board and the depositor; that the

Banking Board and the Commissioner are executive officers, whose duty is to carry forward the police power of the State for the general welfare and that no action at law or equity in favor of a depositor was given by the statute against this board acting within the sphere of its duties. For the object of the law is to serve public not private rights. Whether or not the Oklahoma Act served a private or a public purpose was the very basis of the decision of this Court in *Noble State Bank vs. Haskell*, 219 U. S. 104. The contention of the Bank in that case as appears particularly in its motion for a rehearing (Sec. 219 U. S. 575) was that its private funds should not be taken to pay the private debts of other persons. At page 580, the case on rehearing, Mr. Justice Holmes, speaking for this court, says that the cases cited in the original opinion—

"Were cited to establish, not that the property might be taken for private use, but that, among the public uses for which it might be taken, were some which if looked at only in their immediate aspect, according to the proximate effect of taking, might seem to be private."

And in the original opinion at page 111, it is likewise said:

"If then, the legislature of the State

thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. *Even the primary object of the required assessment is not a private benefit*, as it was in the cases above cited of a ditch for irrigation or a railway to a mine; but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand."

The essence of the law therefore is, not to establish a private right but to conserve public welfare; and, as such, no justiciable rights in the depositors are to be presumed to arise; the law was not primarily enacted to return to the depositor his money, but more properly to prevent the public injury by bank panics. Nowhere is there language used showing an intent to give to a depositor the right to sue.

The Bank Commissioner and the Banking Board exercise a high executive function in the management of the Bank Guaranty Fund. The control and administration of this fund of the State is placed in them. (Sec. 1, Ch. 22, Sess. Laws, 1913, above quoted). They are charged with the duty of seeing that it is used solely for the payment of depositors and other items properly chargeable against it. (See Sec. 6 Ch. 22,

Sess. Laws 1913, above quoted). It is their duty when a claim against this fund is presented, to determine whether or not, it is a proper charge. Necessarily in reaching such determination, they must decide questions of fact, and place a construction upon the law applicable to the case; and further they must bear in mind the purpose of the act, which is to secure public confidence in bank credits.

With the exercise of such a high executive discretion, the courts will not interfere. This doctrine was first announced by Chief Justice Taney, in *Decatur vs Paulding*, 14, Pet. 497, 10 L. Ed. 559. That was a case in which the Secretary of the Navy refused to pay from a pension fund a pension to a widow of a deceased naval officer, because under his construction of the law she was not entitled thereto.

We particularly call the attention of the court to the concurring opinion of Mr. Justice Catron, in which he says:

“Every government is deemed to be just to its citizens; its executive officers equally with the judges of the courts are personally disinterested, and why should not their decisions be as satisfactory and final, they must be final, in most instances, in the nature of things, and the necessities of the government. * * * * * To

permit an interference of the courts of justice with the accounts and affairs of the treasury would soon sap its very foundation; money would not be drawn out according to its own rules, nor could the Secretary of the Treasury ever inform Congress of the amount needed. Congress would of necessity be compelled to consult the Court, not the Secretary, when making appropriations."

The question then resolves itself into this: Is an action to compel state officers to pay a claim from a state fund in their charge, which they, in the exercise of an executive discretion, refused to pay, an action against the State? We think there can be no doubt about the answer.

The supreme test in such case is whether the state is bound by the judgment or whether any of the funds under its control are so bound, and that test being applied there can be no doubt of the outcome in this case.

In the early case of Governor of Georgia vs. Madrazo, 1st Pet. 110, Chief Justice Marshall at page 123, stated the law.

In Smith vs Reeves, 178 U. S. 436, the plaintiff sought a decree compelling the state treasurer of California to pay from the funds in the treasury a sum, which they claimed was

unlawfully collected as taxes. This court in its opinion said that being one to compel the state to pay out money from its funds, it was one against the state.

See *Re. Ayers*, 123 U. S. 443.

Pennoyer vs McConnaughy, 140 U. S. 1,
10.

Louisiana vs Jumel, 107 U. S. 711.

Cunningham vs. Macon & Brunswick Ry. Co. 109 U. S. 446.

In *Murray vs Wilson Distilling Co.* 213, U. S. 150 the plaintiff sought to compel the defendants constituting the State Dispensary Commission of South Carolina to pay a claim out of the proceeds from the dispensary assets. This Commission was appointed for the purpose of winding up the affairs of the State Dispensary. The act creating it, provided:

"It shall be the duty of said commission to close out the entire business and property of the State Dispensary except real estate, and including stock in the several county dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due, and by paying from the proceeds thereof all just liabilities at the earliest date practicable."

It was contended by this act the State vested title to the assets in the commission, for

the benefit of creditors, and therefore, the action was not against the state. But this court decided to the contrary:

“ * * * * * we are of opinion that there is no just ground for the conclusion that the state, in providing by that legislation for the liquidation of the affairs of the state dispensary, intended to divest itself of its right of property in the assets of that governmental agency, and to endow the commissioners with a right and title to the property, which placed so beyond the control of the state as to authorize a judicial tribunal to take the assets of the state out of the hands of those selected to manage the same.”

That case, we think is conclusive of the issue in the case at bar. Here, as there, the State has placed the management of a state fund in the hands of a board of state officers; here, as there, the purpose of the fund is to pay certain claimants; here, as there, the State has selected that board, and no other tribunal to determine what claims shall be paid. The courts have no more jurisdiction in this cause than they had in that.

We respectfully submit that this cause is not one in which it is sought to move the officer through the state but on the contrary the state

is sought to be moved through its officers. Of this, the court has no jurisdiction, as it was in violation of the Eleventh Amendment to the Constitution of the United States.

THE ACTION IS FOR MANDAMUS, NOT
ANCILLARY TO A PRIOR JUDGMENT.

The prayer of the bill is to establish the plaintiff's status as a depositor entitled to be paid from the Depositors' Guaranty Fund, and that the Banking Board "be ordered, commanded and required to pay said deposit and interest thereon out of the Depositors' Guaranty Fund; and if there are not sufficient funds in said Depositors' Guaranty Fund available therefor, that the said State Banking Board be ordered, commanded and required to issue to plaintiff certificates of indebtedness for the amount of such certificates of deposit, to be known as 'Depositors' Guaranty Fund Warrants, of the State of Oklahoma,' bearing six per cent interest, as provided by Section 3 of Article 2, of Chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last session of the State Legislature of the State of Oklahoma." (See Transcript of Record p. 9)

The decree rendered first undertakes to establish the status of plaintiff as a depositor entitled to payment from the Depositor's Guaranty Fund; it then adjudges that plaintiff have and recover of the Banking Board the amounts sued for, "and that the same be paid out of and from the depositors' guaranty fund of the State of Oklahoma," and if the cash available be insufficient, the Board is commanded to issue Depositors' Guaranty Fund Warrants in payment thereof. (See Transcript of Record page 13.)

Although the petition is filed on the equity side of the court, and the order to pay is called a decree, we respectfully submit that the proceeding is nothing but an action for mandamus. The allegations of the bill attempt to set out the averments necessary for mandamus, namely, the plaintiff's right, the defendant's official duty, and the refusal to perform it.

The action cannot be considered as suit against trustees to subject a trust fund, for we have shown that by the decision of this court in *Murray vs Wilson Distilling Co. supra*, this fund being placed in the hands of agents of the State did not divest the State of title thereto, and authorize an action against the Board as trustees. Such an action would be against the state.

The action was in effect mandamus.

Farmers Nat. Bank vs Jones, 105 Fed. 459.

Not being ancillary to any judgment previously obtained, the Federal District Court had no jurisdiction thereof. This question was recently before this court, and was disposed of as follows:

"We deem it settled beyond controversy until Congress shall otherwise provide that circuit courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States."

Covington, etc. Bridge Co. vs Hager, 203 U. S. 109.

And see United States, ex rel Knapp Lake Shore & Michigan So. Ry. Co. 197 U. S. 540.

This rule has been followed a number of times in the lower Federal Court.

When Mr. Taft was on the bench this question came before the Circuit Court of Appeals. In discussing it he said:

" * * * * * Even in states where by statute it is specifically provided that

a mandamus may be issued without other proceeding than an application for mandamus, such a statute does not apply to a circuit court of the United States and (that) in those cases a judgment against the corporation liable for the debt must be rendered before mandamus will issue."

Fuller vs Aylesworth, 75 Fed. 694, 21 C. C. A. 509.

See also

Jabine vs Oats, 115 Fed. 861.

Wiemer vs Louisville Water Co. 130 Fed. 246.

Large vs Consul & Nat. Bank 137 Fed. 168.

Pensacola vs Lehman, 57 Fed. 324; 6 C. C. A. 349.

Denton vs Barber, 79 Fed. 189, 24 C. C. A. 476.

Burnham vs Fields, 157 Fed. 248.

Gares vs. Northwest Nat. Bldg. Assn. 55 Fed. 210.

Indiana vs Lake Erie etc. Ry. 85 Fed 3.

Rule applies to district courts as well as circuit courts.

In Re Forsyth 78 Fed. 301.

We respectfully submit, therefore, that the court had no jurisdiction of this action.

THE PETITION SETS FORTH NO CAUSE OF ACTION.

This assignment raises the question of whether or not the transferee of a time certificate of deposit is a depositor, entitled to share in the Depositors' Guaranty Fund.

The plaintiff in this cause became the holder of the certificates of deposit sued on. These certificates were time certificates payable sixty days and three months after date respectively.

The weight of authority seems to be that a time certificate of deposit is in effect a promissory note. The plaintiff's cause of action was based upon its being a holder of a negotiable instrument issued by the bank. Its rights were the same as those of the holder of the bank's promissory note. It was not a depositor.

Magee, in his recent work on Banks and Banking (Second Edition) says:

"If the law is settled that such instruments are promissory notes, the bank is, in effect, a debtor to the depositor for money borrowed and is not a debtor for deposits received." Page 371.

And on page 372, he says:

"The weight of Authority so far, and at the present time, is that a certificate

of deposit issued by a bank agreeing to pay to the order of a person a sum of money on demand or in the future, the time being fixed, is in effect a promissory note. *If so, it is subject to the law governing negotiable notes and bills, as to presentment for payment, protest, etc.*; and if a promissory note, and the money represented by it is money borrowed by the bank, the statute of limitations, which in most of the States does not run against a deposit, would run against a certificate of deposit."

The Bank Guaranty Law was not enacted for the purpose of securing loans made to the bank; but to secure the currency of checks upon state banks, and to guaranty payment of deposits made in State Banks. We do not believe its purpose was to guarantee payment of loans to banks evidenced by time certificates of deposit.

For the reasons above given we believe the court below erred in rendering the decree in this cause; and the same should be reversed and set aside, and the case dismissed.

Respectfully submitted,

CHAS. WEST,

Attorney General of Oklahoma
Solicitor for Appellants.

Office Supreme Court, U

FILED

OCT 10 1914

JAMES D. MAHER
CLERK

IN

SUPREME COURT
OF THE
UNITED STATES

October Term, 1914.

J. D. Lankford, John J. Gerlach,
W. F. Barber and A. D. Ken-
nedy, Composing the State
Banking Board of the State of
Oklahoma,

Appellants,

vs.

Platte Iron Works Company, a
Corporation,

Appellee.

No. 381

SUPPLEMENTAL BRIEF FOR APPELLANTS.

CHAS. WEST,

*Attorney General of Oklahoma,
Solicitor for Appellants.*

Service of copy of above accepted this Oct.....,
1914.

Solicitor for Appellee.



IN
SUPREME COURT
OF THE
UNITED STATES

October Term, 1914.

J. D. Lankford, John J. Gerlach,
W. F. Barber and A. D. Ken-
nedy, Composing the State
Banking Board of the State of
Oklahoma,

Appellants,

vs.

Platte Iron Works Company, a
Corporation,

Appellee.

No. 381

SUPPLEMENTAL BRIEF FOR APPELLANTS.

Since filing our original brief in this cause, the Supreme Court of Oklahoma, on September 29, 1914, decided the main questions involved in this

appeal. That decision is, we think, conclusive of the case at bar since it holds that the Guaranty Fund is a fund of the State, and that the Banking Board exercises a discretion in determining who are entitled to payment from this fund. We give the opinion in full in the appendix to this brief.

CHAS. WEST,
Attorney General of Oklahoma,
Solicitor for Appellants.

APPENDIX
IN THE
SUPREME COURT
OF THE
STATE OF OKLAHOMA

Charles W. Lovett, D. Beardsley,
and J. J. Sisson, County Com-
missioners of Creek County,
State of Oklahoma,

Plaintiffs in Error,

vs.

J. D. Lankford, W. F. Barber, A.
D. Kennedy and John J. Ger-
lach, Composing the Banking
Board of the State of Oklahoma,
and Farmers & Merchants Bank
of Sapulpa, Oklahoma,

Defendants in Error.

No. 6059

SYLLABUS.

1. Plaintiffs in error presented their claim to the Bank Commissioner and the Banking Board, demanding payment out of the depositors' guaranty fund. Payment was denied upon the ground that such deposit was not protected by said fund. Thereupon petition for writ of mandamus was filed in

the District Court of Oklahoma County. Alternative writ was issued, which, on final hearing, was discharged, and error is prosecuted to this Court. HELD: That the Bank Commissioner and the Banking Board are a part of the executive branch of the State government, and a suit in mandamus, seeking to compel said officers in their official capacity to allow and pay said claim out of the depositors' guaranty fund, is a suit in effect against the State, and cannot be maintained without the consent of the State.

2. The Bank Commissioner and the Banking Board constitute a part of the executive branch of the State government, and the duties devolving upon said officials require the exercise of judgment and discretion. HELD: In the absence of allegation and proof of fraud, or arbitrary action, their decision in a matter within their jurisdiction will not be reviewed or controlled by a writ of mandamus.

3. The facts in this case examined and HELD to bring the case within the rule announced by this Court in the case of Columbia Bank & Trust

Company v. United States Fidelity & Guaranty
Company, 33 Okla. 535

ERROR FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY.

Hon. Geo. W. Clark, Trial Judge.

Affirmed.

V. S. Decker, County Attorney of Creek County;
Dale & Bierer, Wm. T. Hutchings and Ledbet-
ter, Stuart & Bell,

Attorneys for Plaintiffs in Error.

Charles West, Attorney General, and Jos. L. Hull,
Assistant Attorney General,

Attorneys for Defendants in Error.

* * * * *
Opinion of the Court by Riddle, J.:

This proceeding in error is prosecuted from a judgment of the District Court of Oklahoma County in favor of defendants. Plaintiffs, as commissioners of Creek County, filed their petition in the District Court against the State Banking Board and the Farmers & Merchants Bank of Sapulpa, praying for a writ of mandamus. Defendants filed their answer to the alternative writ of mandamus, and upon the issues thus made the court rendered judgment in favor of defendants, discharging the alternative writ.

It is alleged in the petition that the county treasurer of Creek County, on the 10th day of September, 1912, had on deposit in the Farmers & Merchants Bank the sum of \$106,238.36, \$77,435.01 being deposited to the credit of the treasurer of Creek County, and \$28,823.25 was deposited in the name of the treasurer, as a special deposit; that said bank was at the time subject to the provisions of the Bank Guaranty Law of the State of Oklahoma; that said bank failed on the 10th day of September, 1912, while said funds of said county were on deposit; that defendant, Lankford, as State Bank Commissioner, took charge of said bank and its assets; that plaintiffs demanded payment of said deposit from said Banking Board out of the Depositors' Guaranty Fund; and that in the event there was not sufficient funds to pay same, that the Board issue a certificate of indebtedness covering same; that the Banking Board refused to pay same, or to issue a certificate of indebtedness. They prayed for a peremptory writ of mandamus, requiring said Board to pay the amount of said deposit, or to issue a certificate of indebtedness for same.

An alternative writ of mandamus was allowed,

setting out the foregoing state of facts. Defendants deny (1) the jurisdiction of the court; (2) aver that the alternative writ did not state facts sufficient to entitle plaintiffs to the relief prayed. The second ground in the answer was sustained by the court, and judgment rendered, discharging said alternative writ.

Plaintiffs in error allege, first: That the court erred in refusing the peremptory writ of mandamus. Second, in overruling motion for a new trial. Several other errors are alleged, but they all relate to one proposition. The questions presented for our determination are: (1) Is this suit in effect a suit against the State. (2) If such deposit was protected by the Depositors' Guaranty Fund, is a writ of mandamus a proper remedy to secure the relief sought by plaintiffs? (3) Was the deposit in the name of the treasurer of Creek County in the Farmers & Merchants Bank of Sapulpa, at the time it failed, protected by the Depositors' Guaranty Fund?

It is contended by counsel for plaintiffs that the last two questions must be answered in the affirmative, and the first, in the negative; while

counsel for defendants in error contend that the first must be answered in the affirmative, and the last two in the negative. Counsel for the respective parties have filed elaborate and able briefs in support of their contentions. These questions require the construction of the section of the statute relating to the deposits protected by the Depositors' Guaranty Fund, and the authority conferred upon the Banking Board, and the character of duties required to be performed by them.

The first question is: Is this suit, in effect, a suit against the State? If this question may be answered in the affirmative, it will be conceded, we presume, that it cannot be maintained without the consent of the State. If defendants in error may be considered executive officers of the State, and in performing their duties in administering the law under consideration, do so as such officers, and the property entrusted to their control and management by the law is property owned by the State, or property in which the State has a substantial interest, then it can hardly be questioned that this suit, in effect, is against the State. It was said by this Court, in the case of *State ex rel. v. Cockrell*, 27 Okla. 630:

"That the Bank Commissioner is a state officer, has not been and cannot be questioned. That the depositors' guaranty fund, and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund, is as much a fund of the state as the common school fund is also true. The depositors' guaranty fund act was sustained by this Court on the theory of the reserved power of the state to alter and amend charters of state banking corporations for the public welfare (citing authorities). This power exercised for the public welfare by the legislative act which causes to be levied the assessment 'against the capital stock of each and every bank or trust company organized or existing under the laws of this state * * * equal to five per centum of its average daily deposits during its continuance in business as a banking corporation,' for the purpose of protecting the depositors of such banks * * * is the same as that which levies or causes to be levied as tax upon the people and property within the state for the maintenance and support of the common school and educational institutions. The title of such depositors' guaranty fund vests in the State just as much so as the common school lands, or the proceeds of the sale of them, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the state for a specific purpose."

In addition to the act of the legislature, creating the Banking Board and prescribing its duties, it is specifically provided that the State shall have

a first lien upon all the assets of the bank, including liability of the individual stockholders.

In the case of *Pennoyer v. McConnaughy*, 140 U. S. 1, the court states the rule as follows:

"The principle stated by Chief Justice Marshall (in that case) that 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that 'the Eleventh Amendment is limited to those suits in which the state is a party to the record,' has been qualified to a certain degree in some of the subsequent decisions of this court, and now it is the settled doctrine of this court that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, as the court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit. * * * 'The objections to proceeding against state officers by mandamus or injunction are: First, that it is, in effect, proceeding against the state itself; and, secondly, that it interferes with the official discretion in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter.'"

Louisiana v. Jumel, 107 U. S. 711; *Miller v. Raum*, 133 U. S. 200; *Smith v. Reeves*, 178 U. S. 436, 36 Cyc. 915.

It cannot be questioned that a judgment in this case in favor of plaintiffs in error would directly affect the state, and would, in effect, be a judgment against the state, and would require the subjection of state funds to satisfy said judgment. Therefore, it cannot be maintained. That this is a sound and just doctrine is clearly to be seen. If plaintiffs in this case can control the action of the Bank Commissioner and Banking Board in this proceeding in the discharge of their usual and ordinary duties in the manner provided by statute, in the execution of the law confided to their control, then, in principle, every other person or corporation, asserting a claim against this fund and presenting the same to the Banking Board, and such officials' duly act upon same and rule adversely to such claimant, could resort to the courts and not only have the court substitute its judgment for that of such officials, but would harass and create confusion, the effect of which would be to destroy the efficiency of such board. In a late case from the Supreme Court of the United States, *Murray v. Wilson Distilling Co.*, 213 U. S. 151, the court had under consideration a question similar to the one now before us. That

case arose in South Carolina under a dispensary law, section 11 of which act provided:-

"That said commission is hereby declared to possess full power to pass upon, fix and determine all claims against the state growing out of dealings with the dispensary, and to pay for the state any and all just claims which have been submitted to and determined by it, and no other, out of the assets of the dispensary which have been, or may hereafter be, collected by said State Dispensary Commission; Provided, that each and every person, firm or corporation presenting a claim or claims to said commission shall have the right to appeal to the Supreme Court as in cases at law. * * *

Chief Justice White, speaking for the court, said:

"We could not, therefore, sustain the exercise of jurisdiction by the Circuit Court without in effect deciding that the state can be compelled, by compulsory judicial process, to perform a contract obligation. It is certain that at least by indirection the bills of complaint sought to compel the state to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied. But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a state cannot, against the objection of the state, be maintained in a court of the United States. Thus, in *Hagood v. Southern*,

117 U. S. 52, wherein suits brought in a court of the United States against officers and agents of the State of South Carolina, the holders of certain revenue script of the state endeavored to enforce the redemption thereof according to the terms of the statute in pursuance of which the script was issued, which statute was alleged to constitute an ~~irreparable~~ *irreparable* contract. The court said: "Though not nominally a party to the record, it (the state) is the real and only party in interest, the nominal defendants being the officers and agents of the state, having no personal interest in the subject-matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another, or by citizens or subjects of any foreign state." * * * The absence in the winding-up act of a provision conferring authority to review in the ordinary courts of justice the action of the commission concerning claims, instead of supporting the contention that the state had abandoned all property right in the funds placed in the hands

of the commission, tends to a contrary conclusion, since it at once suggests the evident purpose of the state to confine the determination of the amount of its liability to claimants, to the officers or agents chosen by the state for that purpose. And it is elementary that, even if a state has consented to be sued in its own courts by one of its creditors, a right would not exist in such creditor to sue the state in a court of the United States."

In principle, the language quoted applies with all its force to the case at bar. The fact that the legislature failed to make any specific provision for review in the courts of the action of the Banking Board in the administration of the law in question, concerning claims against the depositors' guaranty fund, tends to prove the evident purpose of the state to confine the determination of and the validity of those claims and the question as to whether or not they are protected by this fund, to the officials composing the Board. From the foregoing, it is clear to our minds that the suit in question is, in effect, a suit against the State, and in the absence of the consent of the State, the same cannot be maintained.

The second question requires the consideration and construction of certain sections of the statute governing the State Banking Board and the Bank

Commissioner. Section 299, Rev. Laws, 1910, was amended by section 1 of chapter 22, Session Laws 1913, which provides as follows:

“That Banking Board shall be composed of the Bank Commissioner and three other persons, which persons shall be appointed by the governor, by and with the advice and consent of the Senate, no one of whom shall be an officer or director in a national bank. Said three members shall hold office concurrently with the governor, and as soon as said members are appointed under the provisions of this act, the board shall select one of its members as treasurer. * * * The Bank Commissioner shall be chairman of said board. Said board shall have the supervision and control of the depositors' guaranty fund, and shall have the power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of said fund.”

The latter part of section 2 of this act provides that the Bank Commissioner shall execute a bond in the sum of \$25,000, and each member of said board shall execute a bond in the sum of \$5,000 for the faithful performance of his duty.

The latter part of section 3 of the amendatory act provides for a levy of certain assessments, and then provides:

“Such fund so created shall be known as the Depositors' Guaranty Fund of the State

of Oklahoma, and shall be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in this act."

Certain other provisions are made, which are not material here.

Part of section 300 Rev. Laws 1910 provides:

"If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all banks which have failed, having valid claims against said depositors' guaranty fund, the State Banking Board shall issue and deliver to each depositor having any such unpaid deposit a certificate of indebtedness for the amount of his unpaid deposit, bearing six per cent interest."

The above section has been amended by section 3, chapter 22, Session Laws 1913, which provides for the issuance of certificates of indebtedness, to be known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma."

Rev. Laws, 1910,
Section 300, provides:

"Whenever any bank or trust company organized or existing under the laws of this state shall voluntarily place itself in the hands of the bank commissioner, or whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this state

shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

Id.
Section 303 provides:

"In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 300, the amount necessary to take up the deficiency; and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund."

Section 304 provides that the Bank Commissioner shall take charge of books, records, and

and assets of every description of such bank or trust company and collect debts, dues and claims belonging to it, and upon order of court may compromise or settle such claims and sell certain property belonging to such bank and enforce a personal liability of its stockholders. In considering sections 300 and 303, together, it will be seen that the law has specifically confided to the banking board and the Bank Commissioner the duty and authority to determine the validity of claims against the depositors' guaranty fund. By this section, it is not only their duty to determine when a claim is valid against the bank, but they must further determine whether such claim is protected and required to be paid from the depositors' guaranty fund. *Lankford v. Okla. Engrav. & Printing Co.*, 35 Okla. 404.

In the case of *State ex rel. v. Cockrell*, *supra*, this court again stated:

"The State Bank Commissioner, or the banking department, is a part of the executive department of the state, and is entrusted with the receipt, custody and disbursement of funds of failed banks."

Thus, if defendants in error are part of the executive branch of the state, charged with the exercise of judgment and discretion in the administration of the law under consideration, their acts will not be controlled by mandamus. This is too well settled to now be an open question. And this is true, even where those duties require an interpretation of the law, and when there are no controverted facts. The rule is clearly stated in the case of *United States ex rel. Dunlop v. Black*, 128 U. S. 40, in the following language:

“The principle of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them. Judged by this rule the present case presents no difficulty. The Commissioner of pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether if

the law were properly before us for consideration we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts. *Brashear v. Mason*, 6 How. 92; *United States ex rel. Goodrich v. Guthrie*, 17 How. 284; *Commissioner of Patents v. Whiteley*, 4 Wall. 522; *Georgia v. Stanton*, 6 Wall. 50; *Gaines v. Thompson*, 7 Wall. 347; *United States ex rel. McBride v. Schurz*, 102 U. S. 378; *Butterworth v. Hoe*, 112 U. S. 50; *United States v. Lynch*, 137 U. S. 280."

See also: *Kimberlin v. Commissioner to Five Civilized Tribes*, 44 C. C. A. 109; *Norris v. Gross*, 25 Okla. 287; *County Commissioner v. State*, 31 Okla. 196; *Molacah v. White*, 31 Okla. 693; *Dunham, City Clerk of Guthrie v. Ardery*, Okla. (Not yet officially reported.)

Applying the doctrine stated in the quotation from the foregoing case, it renders the question presented here rather simple. Defendants in error constitute a part of the Executive department of the state. They are required to pass upon the validity of the claim in question, and as to whether it was protected by section 303, *supra*, and was

entitled to be paid out of the depositor's guaranty fund. They did not fail to pass upon the question presented to them, but they did decide it and construed the law adversely to the contention of plaintiffs, holding that such claim was not protected by the depositors' guaranty fund. It was their duty to construe the law and apply it to the facts before them. They evidently followed the construction and application of the statute by this court in the case of *Columbia Bank & Trust Co. v. U. S. Fidelity & Guaranty Co.*, *supra*. Their decision in this regard is upheld by us in this opinion. From the foregoing, it is clear that defendants constitute a part of the Executive Department of the State Government, and that they were vested with the exercise of discretion and judgment in the premises; and their action cannot be reviewed or reversed in a proceeding for writ of mandamus.

Approaching the third question raised: The conclusion we have reached upon the other two questions renders it unnecessary to consider and determine this question, although properly before us. We have carefully read the record and all that counsel have said in discussing this point, and

with much interest, listened to the oral argument, and have considered all in connection with the able and logical opinion in the case of *Columbia Bank & Trust Co. v. U. S. Fidelity & Guaranty Co.*, supra., and to our minds, the facts of this case are so similar to the facts of that case, that in principle there can be no distinction made.

It cannot be seriously questioned that under the Bank Guaranty Law, as construed by this court in the case of *Columbia Bank & Trust Company* case, supra, no state funds deposited in the manner provided by law in any bank are protected by the bank guaranty fund. The principle distinction which can be made under the law governing the deposit of state funds and that of county funds is that the state treasurer, with the approval of the governor and attorney general, is to select the depositories for state deposits; and such depositories shall pay interest on the state funds at the rate of three per cent; and as additional security, the state treasurer is authorized to take first mortgage bonds on farm lands, but is prohibited from taking surety company bonds; while in making deposits of county funds, the county commissioners are to select the depositories and

are permitted to accept surety bonds, but are not authorized to accept first mortgage bonds on real estate. In the deposit of state funds, the governor, attorney general and the state treasurer are to approve the securities; in the deposit of county funds, a commission composed of the county judge, county attorney and county clerk shall pass upon and approve the securities. In principle, in construing and applying this provision of the law it will be seen that there can be no real distinction made between a deposit of state funds in a depository authorized to receive the same, and that of county funds; and this is true, whether this court in that case placed its decision upon the ground that the school fund there was otherwise secured, or on the ground that the statute providing for the deposit of the school funds was a specific provision relating to a special subject, and both acts were passed at the same session of the legislature, or if the deposit there was a special and not a general deposit, or if it was upon all the grounds mentioned. This court, in the Columbia Bank & Trust Company case, *supra*, in effect, held that the deposits of the state were not general deposits, covered and protected by the depositors' guar-

anty fund. So, we hold in this case that the same rule applies to the deposits of Creek County, made in pursuance to the provisions of the statute, prescribing and providing for ample securities, and directing them to be made under strict legislative safe-guards, does not come within the meaning of a general deposit, under section 1540 Rev. Laws 1910, protected and covered by the depositors' guaranty fund. Counsel approve the rule announced in the Columbia Bank & Trust Company case, and say that it is a proper construction of the section of the statute here under consideration; and to do so, is equivalent to an admission in advance that the conclusion we have reached on this point is likewise sound.

From the foregoing conclusion, the judgment of the trial court must be affirmed.

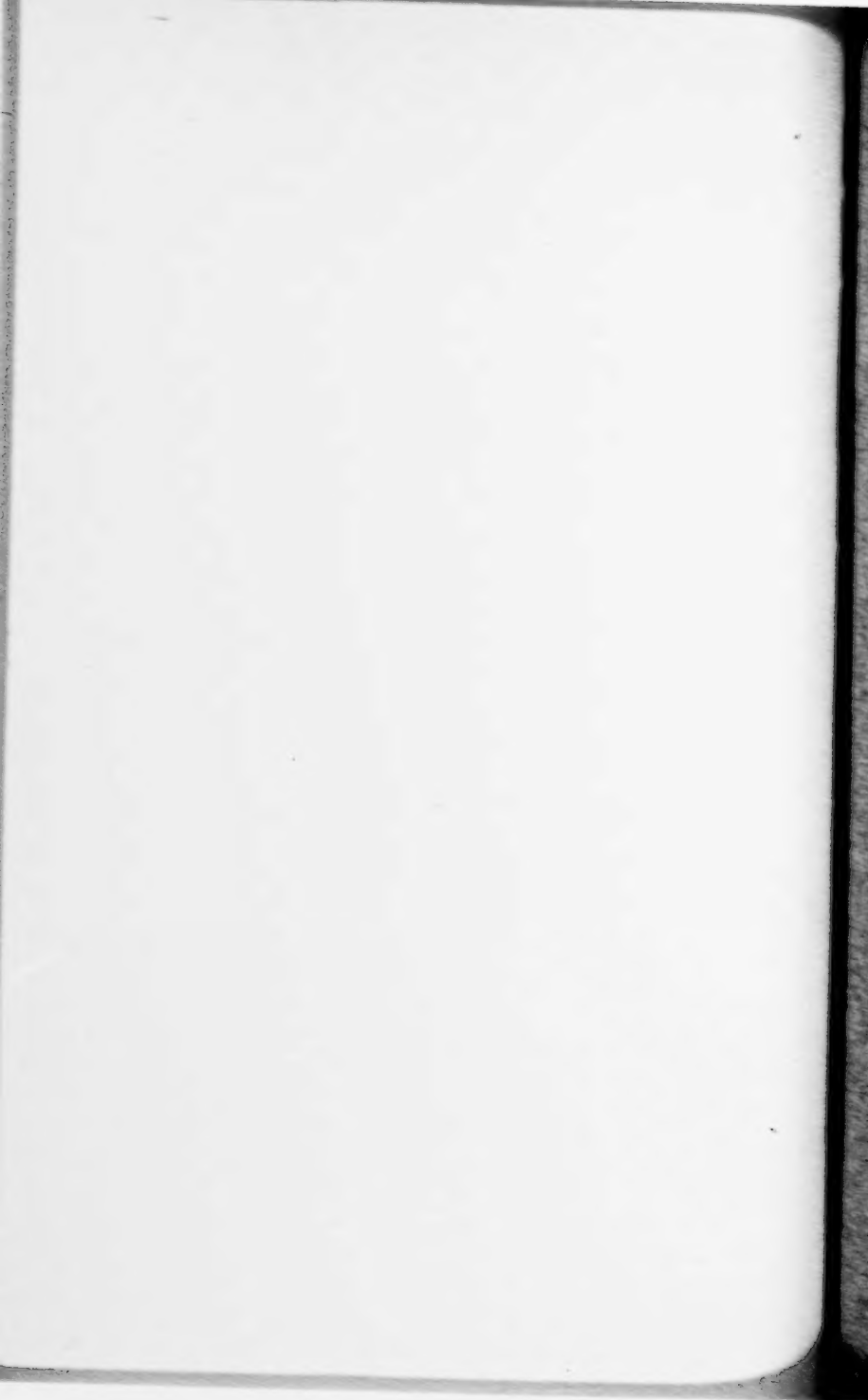
All the Justices Concur.

I. W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the syllabus and of the opinion of said court in the above entitled cause, as the same remains on file in my office.

In witness whereof I hereunto set my hand
and affix the seal of said Court, at Oklahoma City,
this, the 30 day of September, 1914.

W. H. L. CAMPBELL, Clerk.

By.....



13
Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

No. 381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

J. D. Luskford, John J. Gerlach, J. P. Barber and
A. B. Kennedy, Comprising the State Banking
Board of the State of Oklahoma Appellants
vs.

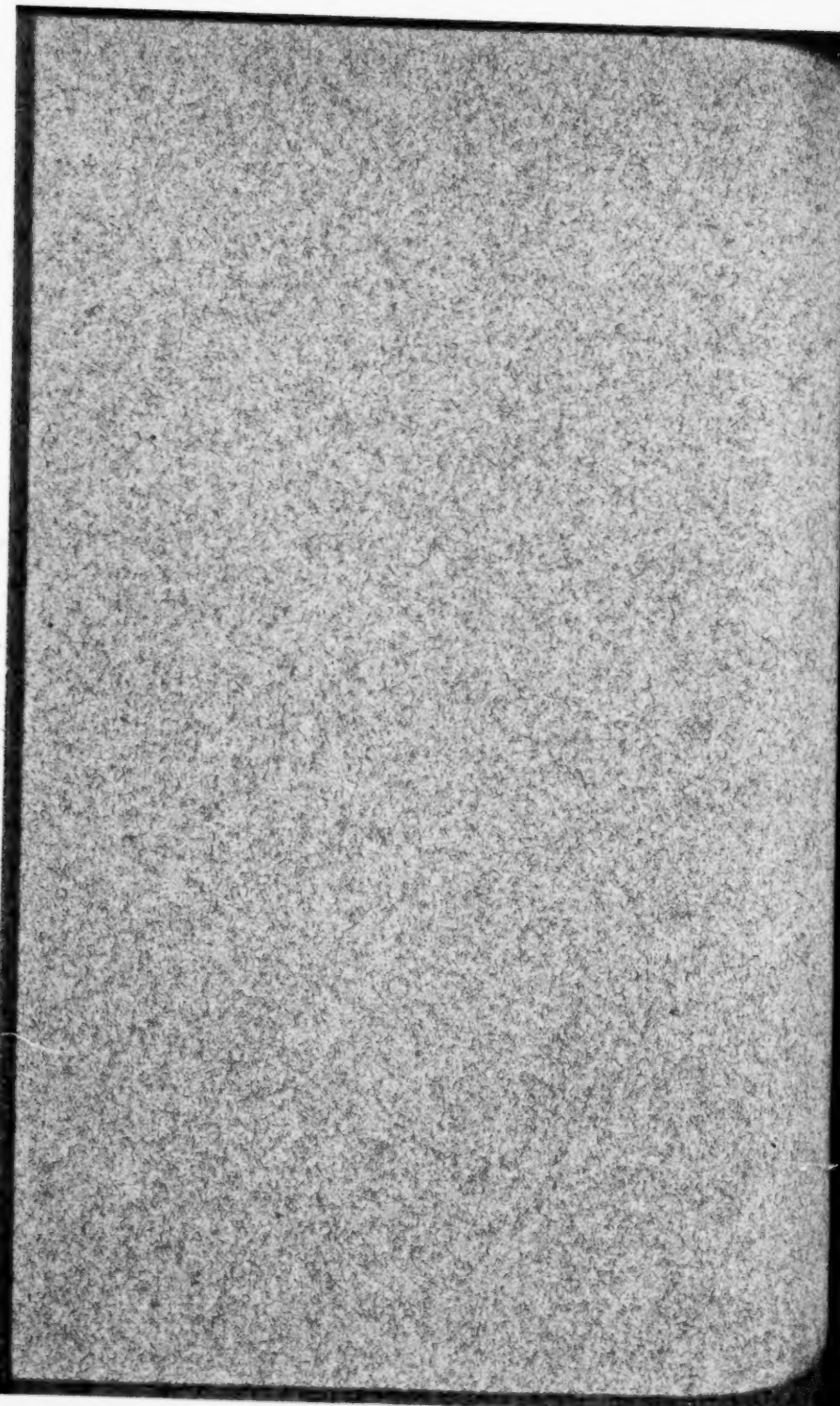
Platte Iron Works, a corporation, Appellee

BRIEF ON BEHALF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
OKLAHOMA

Howard Gray of Carthage, Missouri
Alan McReynolds, of Carthage, Missouri
Solicitors for The Platte Iron Works
and parties similarly situated.

THE CARTRIDGE DEMOCRAT JOB DEPT.



No. 381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

J. D. Lankford, John J. Gerlach, J. F. Barber and
A. D. Kennedy, Comprising the State Banking
Board of the State of Oklahoma - - - - - Appellants
vs.

Platte Iron Works, a corporation, - - - - - Appellee

BRIEF ON BEHALF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
OKLAHOMA

STATEMENT

The principal brief in this case is prepared and filed by Hon. Charles B. Loomis of Kansas City, Missouri, chief counsel of The Platte Iron Works Company. The following brief is prepared by counsel who represent parties who are similarly situated and whose cause is stipulated to abide the outcome of this case, the same question being in issue in all of the controversies. For the purposes of this brief counsel adopt statement made by Judge Loomis.

JOINDER IN ERROR

I

The proceedings at bar is not an original one in mandamus but proper relief which, under the constitution of the United States and the Constitution of the State of Oklahoma, is to be accorded to an injured party where state officers have failed to do their duty.

II

This action is not an action against the State. The defendants cannot seek shelter behind the state for the abuse of their discretion in office. This is true not only on account of the reasons assigned by Judge Loomis, but for the following constitutional reasons:

a. Section 55 of Article 5 of the Constitution of Oklahoma provides that no money can be paid out of the treasury of the state without an appropriation by law. It is admitted that the State Banking Board does not wait for legislative appropriation by law to pay out its funds, and appellee contends that no such appropriation is needed. That being true, the funds in the hands of the State Banking Board are not state money in the ordinary sense of the word but a special fund collected from limited sources, held in trust to be used for certain purposes.

b. Section 15 of Article 10 of the constitution of Oklahoma provides that the credit of the state shall not be given, pledged or loaned to any individual company,

corporation or association. If the State Banking Board was the state and the funds in its hands were state money in the general sense of the word, the state would surely be lending its credit to every state bank within its boundary and the guaranty law would be unconstitutional.

c. To hold that the State Banking Board can at its own whim determine who is and who is not a depositor and pay accordingly would be in violation of Sections 6 and 7 of Article 2 of the Bill of Rights of the Constitution of Oklahoma.

III

The word "deposit" has a well defined meaning at law and when the Banking Act of the State of Oklahoma requires that on the taking over of a bank the "depositors" shall be paid in full. The holders of certificates of deposit are just as much depositors as those who carry a checking account. The relation of debtor and creditor exists between the bank and the depositor in each case.

ARGUMENT

I

The proceedings at bar is not an original one in mandamus but is the enforcement of a justiciable right which is to be accorded the injured party where state officers have failed to do their duty. On this branch of the case we do not care to present any further authorities or argument than those already presented by Judge Loomis in his very able brief, to which we refer in conjunction with the matters hereinafter developed.

II

This action is not an action against the state. The defendants cannot seek shelter behind the state for the abuse of their discretion in office..

This is true not only for the reasons assigned by Judge Loomis but on the following constitutional grounds.

a. Section 55 Article 5 of the Constitution of the State of Oklahoma is as follows:

No money shall ever be paid out of the treasury of this State nor any of its funds, nor any of the funds under its management, except in pursuance of an appropriation by law, nor unless such payments be made within two and one half years after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

The purpose of this constitutional provision is to control the method in which public money or state funds should be disbursed. The word "appropriation" has a definite and certain meaning in law and is generally defined as the setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive offices of the government are authorized to use that money and no more, for that object and no other.

State v. Moore, 69 N. W. 373; 50 Neb. page 88.

Citing Ristine v. St. 20 Ind. 328.

Clayton v. Barry, 27 Ark. 129.

Stratton v. Greene, 45 Cal. 149.

State v. LaGrave, 41 Pac. 1075, 23 Neb. 25, 62

Am. St. Rep. 764.

St. v. Wallichs, 12 Neb. 407, 11 N. W. 860.

Proll v. Dun, 22 Pac. 143, 80 Cal. 220.

As applied to the general fund in the treasury of a state, "appropriation" is defined to be an authority from the Legislature, given at the proper time and in legal form to the proper officer, to supply sums of money, out of that which may be in the treasury in a given year, for specific objects or demands against the state.

State v. Lindsley, 3 Wash. St. 125, 27 Pac. 1019.

State v. King, 67 S. W. 812.

Ristine v. State, 20 Ind., 328.

Shatteck v. Kincaid, 49 Pac. 758, 31 Ore. 379.

The matter is discussed fully in the case of Ristine v. State and it seems pertinent to quote from that decision:

"Appropriation" as used in Const. art. 10, Sec. 3, providing that no money shall be drawn from the state treasury but in pursuance of "ap-

appropriations" made by law, means authority from the Treasurer, given at the proper time, and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury in a given year to a specified object or demand against the state. "An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the Auditor is authorized to draw his warrant upon an 'appropriation' and the Treasurer is authorized to pay such warrant if he had appropriated money in the treasury. Such an 'appropriation' may be prospective; that is, it may be made in one year of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenue; so a direction to pay money out of the treasury upon a given claim or for a given object may, by implication include in the direction an appropriation. But the pledge of the faith of the state that revenues shall be provided in the future and applied to the discharge of given claims against the states, does not authorize the officers of the state, without further legislative direction to apply the general fund in the treasury to the payment of those claims; it is not an appropriation of the money in the general fund." "A promise by the government to pay money is not an appropriation. A duty on the part of the Legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the state is not an appropriation of money with which to redeem the pledge. Usage of paying money, in the absence of an appropriation, cannot make an appropriation for future payment," *Ristine v. State*, 20 Ind. 328, 331.

Appellants counsel in the case at bar contends that the action of the appellee here is one against the state and cannot be maintained for that reason. He reaches his conclusion that it is an action against the

state because of an obiter which appears in the case of Noble State Bank v. Haskell, where the Supreme Court of Oklahoma in that case used the following language:

"The depositors guarantee fund and funds of a failed bank in the hands of a bank commissioner for the purpose of reimbursing the depositors guarantee fund is as much a fund of the state as the common school fund."

As applied to the facts of the case under consideration, that statement was probably true, but it does not warrant the conclusion which the attorney general seeks to draw from that statement as applied to the facts in Statutes of Oklahoma 1909 contains the law with reference to the school funds in Oklahoma. Section 7916 provides that the state superintendent of public instruction, the Secretary of State and the State Treasurer shall constitute a Board of Commissioners for the management and investment of the school funds. The organization of that Board is also provided for in some detail and their method of handling business prescribed. In Section 7919 it is provided as follows:

Whenever there accumulates in the hands of the State Treasurer the sum of One Thousand Dollars belonging to the permanent school fund of the state, it shall be his duty to call said Board together and they shall apportion that money to the various counties of the state in proportion to the scholastic population of each; thereupon it shall be the duty of the state treasurer to transmit to the treasurer of the various counties the sum so appropriated to each county and the treasurer of the county shall hold the same as a part of the permanent school fund of this state to be dealt with as hereinafter provided.

Suppose, for example, that this Board of Commissioners instead of apportioning funds coming to its hands, as required by this statute, should apportion those funds as it suited their own pleasure and wishes, and not in accordance with the school population as therein provided, making special disbursements to favored counties and omitting others. Would it be seriously contended by the attorney general that those counties who receive no benefit from this school fund have no remedy against this Board and would be obliged to surrender their claims upon these funds, simply because they were public or state funds and therefore these commissioners were the state officers and could not be sued? Such a contention is not founded in reason nor in justice, and we do not believe will ever be sustained by any court. It has been repeatedly held that administrative or ministerial officers with duties prescribed by law for their performance may be compelled to perform those duties by those who may be directly interested in their performance.

Board of Liquidation v. McComb, 92 U. S. 531,
23 L. Ed. 623.

Rolston v. Mo. Fund. Com. 120 U. S. 390, 7 Sup.
Ct. 599 30 L. Ed. 721.

Graham v. Folsom, 200 U. S. 248, 50 L. Ed 464.

Taylor v. Louisville & N. R. Co., 31 C. C. A. 537,
88 Fed. 350.

Madison v. Smith, 83 Ind. 502.

Huidekoper v. Hadley, 177 U. S. 1.

State Board of Equalization v. People 191 Ill.,
528, 61 N. E. 339, 58 L. R. A. 513.

State ex rel. Bourne, 151 Mo. App. 104.

State ex rel. v. Adcock, 206 Mo. l. c. 556, 105 S.
W. 270.

What has been said with reference to the position of the commissioners of the Public School Funds equally applies to the Banking Board. Section 323 of the Revised Statutes of 1909 provides:

"In event that the Bank commission shall take possession of any bank or trust company which is subject to the provisions of this Act, the depositors of said bank or trust company shall be paid in full."

The payment of depositors under this statute becomes a ministerial duty, a matter in which there is no discretion vested in the Banking Board. True, these funds might be state funds in the same sense that school funds are, but just as in the case of the school funds they are in the hands of a special Board to be used for a limited purpose, that purpose clearly defined by the statute, and more than that, they are collected from a limited source, to-wit, the banks which in themselves receive a special benefit from this guarantee fund. If these funds were state moneys proper, payable out of the state treasury, under Section 55 of Article 5 above quoted necessarily they could only be disbursed on an appropriation made by the Legislature. Any other disbursement would be unlawful and in the face of the constitution. The Legislature could not even delegate this authority to disburse. They could only make appropriation from time to time as in their discretion might seem fit.

The Supreme Court of Oklahoma and this court both held the guarantee fund Act as constitutional and

we concur in that conclusion and being constitutional it inevitably follows that it in no way conflicts with Section 55 of Article 5 above quoted, and therefore the Guarantee Fund is not state money in the sense contended by the attorney general, but money to be disbursed by ministerial officers whose acts are subject to the control of the courts where they fail to perform the duties delegated to them.

b. Section 15 Article 10, of the Constitution of Oklahoma is as follows:

The credit of the state shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the state; nor shall the state become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax or otherwise, to any company, association or corporation.

One might believe from the attorney general's brief that he had absorbed the popular idea that prevailed at the time of the enactment of the Guarantee Act. It was then often stated and in a hasty and ill informed sense accepted as true "that the state was behind the state banks. "In other words, that the whole credit and treasury of the state was available for the purpose of taking care of depositors in state institutions. Of course such was not the case. The elementary facts were that the banks, by means of this legislation were compelled to contribute a definite amount to a fund which was to be held by certain officers selected in a manner provided by the statute, and which fund was to be used primarily for

the benefit of depositors in case banks failed, and secondarily for the benefit of the banks themselves who were the contributors to the fund.

This was the sum and substance of this legislation. The law was not in contravention of the above constitutional provision because the treasury of the state of Oklahoma was not available to satisfy depositors. The credit of the state had not been loaned to the banks. The state had simply established sort of a guardianship over these banks such as a Federal government establishes over national Banks. True, this guardianship went a bit further, in that it made an effort to guarantee the safety of depositors, something the Federal government has not undertaken. But those depositors, if paid, were to be paid from resources furnished by contributing banks and not from the state treasury. The state itself did not say to the world "The treasury of this State and its credit is a guarantee to depositors of failed banks that their deposits will be promptly paid." On the contrary all it said was that "We will assess a fund for that purpose." Further than that would have been in contravention of this constitutional provision.

The attorney general, hard pressed for reasons to sustain the action of the State Banking Board, takes the position that the State Banking Board, is the State, and being the State cannot be sued. If the Banking Board in an official capacity is the state, just as is the governor in his official capacity, and the depositor's Guarantee fund is State treasury money just as is the general revenue fund, then the whole act is unconstitutional. We do not be-

lieve the Act unconstitutional and we cannot give or assent to the interpretation now urged by the attorney general. The money in the fund is not subject to appropriation by the legislature for any purpose it may see fit. On the contrary it is collected from a special source for a limited purpose. The credit of the state is not loaned, simply the credit of this fund. *Ipsa facto* it follows that this is not a suit against the state.

c. Article 2 which is the Bill of Rights of the Constitution of Oklahoma contains the following sections:

Sec. 6. The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property or reputation; and right and justice shall be administered without sale, denial, delay or prejudice.

Sec. 7. No person shall be deprived of life, liberty, or property, without due process of law.

For the purposes of this case these two sections may as well be discussed together. The first section simply restates the almost universal constitutional guarantee that under our system of laws there is no wrong without a remedy, and yet to deprive the appellee in this case of its money and deny it judicial relief with the barren statement that this action could not be maintained because against the state would certainly work a wrong, and no less certainly find appellee without a remedy. No less certainly would such a course be in the face of Section 7 of the Constitution of Oklahoma in depriving the appellee of its property without due process of law.

The phrase "Due process of law" has been defined so repeatedly both by this court and to it that it is superfluous to suggest more than the various authorities who have considered it. Briefly stated:

"Due process of law is secured if the laws operate on all alike, and do not subject an individual to an arbitrary exercise of the powers of government. *Duncan v. Missouri*, 152 U. S. 377, 382, 14 Sup. Ct. 571, 38 L. Ed. 485; *Connolly v. Union Sewer Pipe Co.*, 22 Sup. Ct. 431, 439, 184 U. S. 540, 46 L. Ed. 679; *Florida Cent. & P. R. Co. v. Reynolds*, 22 Sup. Ct. 176, 179, 183 U. S. 471, 46 L. Ed. 283; *Philbrook v. Newman* (U. S.) 85 Fed. 139, 143; *Seaman v. Clarke*, 69 N. Y. Supp. 1002, 1005, 60 App. Div. 416.

Due process is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Cantini v. Tillman* (U. S.) 54 Fed. 969, 975 (citing *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816); *Leeper v. Texas*, 130 U. S. 462, 468, 11 Sup. Ct. 577, 579, 35 L. Ed. 225; *Bank of Columbia v. Okely*, 17 U. S. (4 Wheat) 235, 244, 4 L. Ed. 559; *Hoover v. McChesney* (U. S.) 81 Fed. 472, 481; *In re Kemmler*, 136 U. S. 436, 448, 10 Sup. Ct. 940, 34 L. Ed. 519; *Marchant v. Pennsylvania R. Co.*, 14 Sup. Ct. 894, 896, 153 U. S. 380, 38 L. Ed. 751; *Pinney v. Providence Loan and Investment Co.*, 82 N. W. 308, 310, 106 Wis. 396, 50 L. R. A. 577, 80 Am. St. Rep. 41; *State v. Staten*, 46 Tenn. (6 Cold.) 233, 234; *State v. Loomis*, 22 S. W. 350, 351, 115 Mo. 307, 21 L. R. A. 789; *Zeigler v. South & N. A. R. Co.*, 58 Ala., 594, 599; *Weimer v. Bunbury*, 30 Mich. 201, 214; *Rockwell v. Nearing* 35 N. Y. 302, 306; *State v. Hammer*, 89 N. W. 1083, 1085, 116 Iowa, 284; *State v. State Board of Medical Examiners*, 26 N. W. 123, 124, 34 Minn. 387; *Eames v. Savage*, 77 Me. 212, 221, 52 Am. Rep. 751; *Avant v. Flynn*, 49 N. W. 15, 18, 2 S. D. 153; *McFadden v. Longham*, 58 Tex. 579, 5858.

Certainly no better case than the one at bar could be selected to illustrate the reason and importance of this constitutional guarantee. The testimony of the bank commissioner disclosed that the evidence before the Banking Board supporting the claim of the City of Sapulpa and the evidence supporting the claim of appellee were practically the same.

No unprejudiced observer could reach any other conclusion than that the decision of the Banking Board with reference to these two deposits where the evidence was the same and one was paid and one was refused, was controlled by caprice, whim or favoritism. The money in both cases came from the same source. It followed the same course into the Bank's hands. It reached the bank in the same fashion and was held by them in the same way, and yet in one instance the local municipality's deposit was paid by the Banking Board and on the other hand the certificate of the foreign corporation was refused.

Is it to be said that in a case of this kind a party who is deprived of his property has no remedy? Is the proud boast of our constitutional law, both national and state, that "for every wrong there is a remedy" to be laughed at, forgotten and denied with the declaration that "This is the King's justice. The King can do no wrong?" The contention of the appellant in this case amounts to that. It amounts to a denial of appellee's rights in the courts of justice. It would deprive the appellee of his property without due process of law and with absolutely no remedy, affording depositors or failed banks

the same comfort accorded to the subjects of *le grand Monarque*, whose questions were answered by Louis in this language: "The State? Why! I am the State."

III

The word "deposit" has a well defined meaning at law and when the Banking Act of the State of Oklahoma requires that on the taking over of a bank the "depositors" shall be paid in full, the holders of certificates of deposit are just as much depositors as those who carry a checking account. The relation of debtor and creditor exists between the bank and the depositor in each case.

In reaching the conclusion as to whether the holder of a certificate of deposit is protected by the Bank Guaranty Law of Oklahoma, the following statutes of Oklahoma are very important:

Section 4634 Compiled Laws of Oklahoma, 1909 reads:

"Bills of exchange, promissory notes, bank notes, checks, bonds, certificates of deposit are negotiable instruments."

Sections 2989 and 2990 of said Compiled Laws define deposits as follows:

"A deposit for keeping is one where the depositary must return the thing deposited. A deposit for exchange is where the depositary must return a thing corresponding to the deposit."

Section 3025 reads:

"A deposit for exchange transfers to the depository the title of the deposit and creates between him and the depositor, the relation of debtor and creditor."

Section 280 reads:

"A Banking corporation organized under the provisions of this Act shall be permitted to receive money on deposit not to exceed ten times the amount of its paid up capital and surplus, deposits of other banks not included, and to pay interest thereon not to exceed, etc."

The Oklahoma laws above cited provide that the title to the article deposited for safe keeping shall at all times remain the property of the depositor, while in deposits for exchange the title vests in the depository.

In an early day in case of *Foley v. Hill* 2 H. of L, 28, Lord Cottingham said:

"Money when paid into bank ceases altogether to be the money of the principal. It is then the money of the bank, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the bank is money known by the principal to be placed there for the purpose of being under the control of the bank; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of banks in some places, or the principal and a small rate of interest, according to the custom of banks in other places."

In the recent case of *Carlson vs Kies*, decided by the Supreme Court of Washington, August 28, 1913, reported in 134, Pacific 809, the Court defines deposits as follows:

"A deposit in a bank is either general or special. Where a general deposit is made, it is either credited to the account of the depositor subject to his check or evidenced by a demand or time certificate. The title to the deposit in such cases passes to the bank and it becomes the debtor of the depositor. On the other hand, when a bank accepts a special deposit, it becomes a trustee of the depositor and hold the money subject to the trust."

In *Covey vs Cannon* 149 S. W. 514, the Supreme Court of Arkansas uses the following language:

"If the moneys of these claimants had been placed on deposit in the bank in the usual way, they would have been general deposits, and established relation of debtor and creditor between the bank and the depositors; the bank having the right to mix the money with its other funds and to use it in its own business. If it was placed in the bank for safe keeping and not to be checked out by the depositor, or under an agreement that the bank should act as bailee or agent and deliver the money to some other persons under certain conditions, or apply it to a special purpose, it would have been a special deposit and the bank an agent or bailee with no right to use it and mingle it with its own funds."

This Court in *Commercial National Bank vs Armstrong* 148 U. S. 50 defines deposits as follows:

"All deposits made with banks may be divided into two classes, namely, those in which

the banks becomes bailee of the depositor, the title to the thing deposited remaining in the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money and lends it to the bank. And the latter in consideration of the loan of the money and the right to use it for his own profit agrees to refund the same amount or any part thereof, on demand."

The above statutes of Oklahoma really define general and special deposits—using the term "deposit for exchange" for the former, and "deposit for safe keeping" for the latter, and therefore it must be admitted that a certificate of deposit represents a general deposit and this is the general rule.

The Oklahoma Statute provides: "Depositors shall be paid in full," and while we have not been able to find the identical language construed by an Appellate Court, we do find very similar language construed by such court.

Wilkes & Co. vs Arthur et al (Supreme Court of S. C.) 74 S. E. 361.

Lamar vs Taylor, (Supreme Court of Georgia), 80 S. E. 1085.

Murphy v. Pacific, (Supreme Court of California), 62 Pac. 1059.

In the South Carolina case *supra*, the statute under consideration reads:

"Provided, that stock holders in banks or banking institutions shall be liable to depositors

therein, in a sum equal in amount to their stock."

The question in the case was whether the holders of time certificates were depositors of the bank within the meaning of this statute. In deciding this question, the Court used the following language:

"The Framers of the Constitution did not contemplate fine spun distinctions between those depositing money in the bank, subject to draft, and those receiving time certificates for their deposits; nor the characteristics of a certificate of deposit and those of a promissory note. It makes no difference how much similarity there may be between a time certificate of deposit and a promissory note, it does not prevent the person receiving the certificate of deposit from still occupying the relation of a depositor. No authority has been cited, and we do not believe any can be found, sustaining the proposition that a party depositing money in a bank in the usual course of business, and accepting a time certificate, is not to be regarded as a depositor."

In construing a like statute the Supreme Court of Georgia in *Lamar vs Taylor*, *supra*, said:

"It is further contended that in arriving at the amount for which suit was directed to be brought against each stock holder, the parties have included the claims of holders of certificates of deposit as well as those of ordinary deposits subject to check. The argument was that certificates of deposit were in the nature of promissory notes and the holders of them were really creditors of the bank rather than depositors within the meaning of the Charter. The language of the charter refers in general terms to depositors. It does not confine the liability of stock holders to the pay-

ment of depositors whose claims are evidenced by extries in pass books, of exclude those whose claims might be evidenced by certificate. Certificates of deposit are not always uniform in their provisions, and the special terms contained in them may to some extent vary their effect. The contention with which we are dealing does not depend upon the terms of any particular form of certificate, but on the theory that certificate holders generally are not depositors within the meaning of the charter. It is true that holders of certificates of deposit are creditors of a bank and that certificates of a certain form have been declared to be in effect promissory notes. But a general deposit also creates the relation of debtor and creditor between the bank and the depositor. It is not contemplated that the actual money deposited will be held by the bank, but that it will be used and other money will be paid when called for by the check of the depositor. Thus whether a general deposit be evidenced by an entry in a pass book, or by a deposit slip, or by a certificate the legal relation between the parties is that of debtor and creditor. The expression "certificate of deposit" in itself imports that it is based upon a deposit and the issuing of such a certificate does not exclude the holder from falling within the general descriptive word "depositors" for whose benefit the additional liability was created by the charter."

The Presiding Judge did not err in treating the holders of certificates of deposit as depositors within the meaning of the charter.

In *Murphy vs Pacific Bank*, *supra*, the contention was that a certificate of deposit is a promissory note, and the Court said:

"A certificate of deposit issued by a bank is

not known as a promissory note, though it is negotiable, is for a certain sum, payable to a specific person, or order, and no time of payment being specified is payable immediately. The code however declares there are six classes of negotiable instruments, namely, bills of exchange; promissory notes—certificates of deposit, thus distinguishing between them by placing them in separate classes. It is sufficient for the purposes of this case to say that in the business world, as well as in legislation and decisions of Courts, certificates of deposit are understood to represent money left with a bank or banker and which is to be retained until the depositor demands it; the certificate being in the nature of a receipt executed by the bank therefor, in which is usually recited, as in the certificate under consideration, the fact that money has been deposited with the bank by the person to whom the certificate is issued; and we therefore conclude that in the Act of 1862 under which the Pacific Bank was organized and exists that the term "depositors" was intended to include such depositors as well as those made upon open account and subject to check and that certificates do not imply a loan in the ordinary sense nor create the ordinary relation of debtor and creditor evidenced by promissory note."

Section 4634 Supra shows that the Legislature of Oklahoma in enacting its laws did not consider a promissory note and a bank certificate as one and the same thing as it has expressly separated them into classes by this Section.

The language found in Section 280 Supra of the laws of Oklahoma is very important as it clearly shows that interest bearing deposits are covered by the Bank Guaranty Law. Our contention is that the statute au-

thorizing the banks to pay interest on deposits refers to all deposits whether subject to check or represented by time certificates. It is the contention of the Attorney General that deposits subject to check, but bearing interest are covered by the Guaranty Law but deposits not subject to check and represented by time certificates are not protected by the law. We contend there is no authority or reason for such a technical construction of the Act.

We submit that under the law and the facts, the finding of the trial judge should be affirmed.

Howard Gray,
Allen McReynolds,

Counsel for Appellee and
others similarly situated.

John W. Halliburton

INDEX OF CASES.

Board of Liquidation v. McComb, 92 U. S. 531, 23 L. Ed. 623	8
Carlson v. Kies, 134 Pac. 809	17
Clayton v. Barry, 27 Ark. 129	5
Commercial National Bank v. Armstrong, 148 U.S. 50 ..	17
Covey v. Cannon, 149 S. W. 514	17
Foley v. Hill 2 H. of L. 28	16
Graham v. Folsom, 200 U. S. 248, 50 L. Ed 464	8
Huidekoper v. Hadley, 177 U. S. 1	8
Lamar v. Taylor (Supreme Court of Georgia) 80 S. E. 1085	18
Madison v. Smith, 83 Ind. 502	8
Murphy v. Pacific (Supreme Court of California) 62 Pac. 1059	18-20-21
Nobles State Bank v. Haskell	7
Proll v. Dunn, 22 Pac. 143, 80 Cal. 220	5
Ristine v. St. 20 Ind. 328	5
Rolston v. Mo. Fund Com. 120 U. S. 390, 7 Sup. Ct. 599 30 L. Ed. 721	8
Shatteck v. Kincaid, 49 Pac. 758, 31 Ore. 379	5
State Board of Equalization v. People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513	8
State ex rel Bourne, 151 No. App. 104	8
State ex rel v. Adcock, 206 Mo. l. c. 556, 105 S. W. 270 ..	8
St. v. King, 67 S. W. 812	5
State v. La Grave, 41 Pac. 1075, 23 Neb. 25, 62 Am. St. Rep. 764	5
State v. Lindsley, 3 Wash. St. 125, 27 Pac. 1019	5
State v. Moore, 69 N. W. 373, 50 Neb. page 88	5
State v. Wallichs, 12 Neb. 407, 11 N. W. 860	5
Stratton v. Greene, 45 Cal. 149	5
Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 88 Fed. 350	8
Wilkes & Co. vs Arthur et al. (Supreme Court of C. S.) 74 S. E. 361	18

INDEX OF SUBJECTS

Statement	- - - - -	1
Joinder in Error	- - - - -	2
Argument	- - - - -	4
On Section 55 Art, 5 Okla, Constitution	-	4
On Section 15, Art. 10, Okla. Constitution	-	10
Sec. 6 and 7, Article 2, Okla. Constitution		12
Certificates of Deposit	- - -	15
Index of Cases	- - - - -	23

14

Office Supreme Court
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JAMES B. MA

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

J. D. LANKFORD, JOHN J. GERLACH, W. F. BARBER and A. D. KENNEDY, Composing the State Banking Board of the State of Oklahoma,

Appellants,

v.

No. 381

PLATTE IRON WORKS COMPANY, a Corporation,

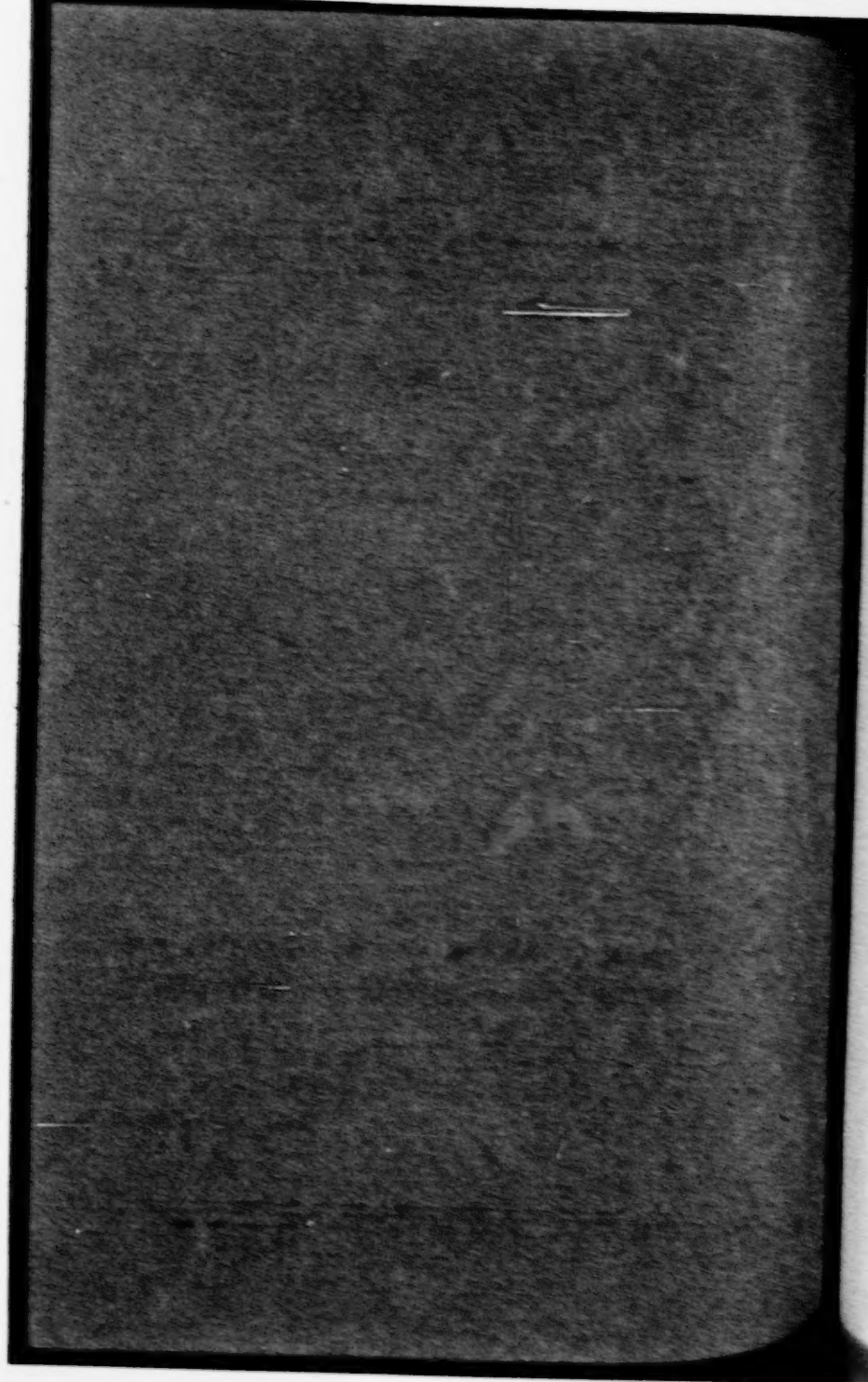
Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF OKLAHOMA.

BRIEF.

STATEMENT, POINTS AND AUTHORITIES, AND
ARGUMENT ON BEHALF OF APPELLEE.

CHAS. A. LOOKER,
Solicitor for Appellee.



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tion,

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BRIEF.

**STATEMENT, POINTS AND AUTHORITIES, AND
ARGUMENT ON BEHALF OF APPELLEE.**

STATEMENT OF FACTS.

Defendants John J. Gerlach, A. D. Kennedy and W. F. Barber constitute the state banking board of Oklahoma. Defendant J. D. Lankford is state bank commissioner of said state. The Farmers & Merchants Bank, of Sapulpa, Oklahoma was a state bank incor-

porated under the laws of Oklahoma, and located at Sapulpa, Oklahoma. On the 10th day of September, 1912, J. D. Lankford, as state bank commissioner took charge of said bank, together with all of its assets and property and proceeded to wind up its affairs in accordance with the state banking law of Oklahoma.

C. J. Wurtzberger was during 1912 and hitherto has been the city treasurer of Sapulpa, Oklahoma, and kept a deposit account as city treasurer with the Farmers & Merchants Bank.

The Southwestern Engineering Company had a contract with the city of Sapulpa to construct a water works system for said city. E. J. Merkle & Company, of Kansas City, was a sub-contractor under the Southwestern Engineering Company, for a part of said work.

On June 8th, 1912 a settlement was made between said construction company and the city of Sapulpa. A city warrant, in the usual form was issued to E. J. Merkle & Company for the amount due that company, to-wit: \$10,429.16, drawn on the city treasurer of said city. Said warrant was presented to said city treasurer for payment and said city treasurer, in payment for said warrant, issued his check payable to the order of E. J. Merkle & Company, for said amount, on the Farmers & Merchants Bank, of Sapulpa, Oklahoma. This check was presented to the said Farmers & Merchants Bank, for payment on said date, and E. J. Merkle & Company accepted in payment of said check, the sum of \$2,529.16 in cash and deposited the remaining \$7,800.00 in said bank, and received as evidence of such deposit, the two certificates of deposit herein sued on.

The check drawn by said city treasurer on said bank after having been paid by said bank was returned to the said city treasurer, properly endorsed and charged to his account in said bank, as city treasurer of said city.

Warrants and checks were drawn against the water works fund, a special fund created by the sale of an issue of bonds and ap-

plicable solely to the payment for the construction of the water works system and plant in said city of Sapulpa.

The bank book of said city treasurer with said bank showing said deposits and checks, was introduced in evidence, was regular on its face, kept in the usual course of business with said bank, and showed that on June 8th, 1912 when said check was issued, the city treasurer had on deposit in said bank, \$28,053.44.

The check was returned to the city treasurer by said bank in the usual course of business and the paid check was charged against the account of said city treasurer and the bank received credit in said account.

When the said bank failed on September 10th, 1912, said city treasurer had on deposit in said bank, in said account the sum of \$36,455.00 and some cents.

After the failure of the bank, the state banking board settled with said city treasurer for the amount of his deposit as shown by said bank book, and accepted his said bank book as correct.

The said bank book of said city treasurer, said warrant, said check, the records of the commissioners of the city of Sapulpa, authorizing their issue, and the testimony of said city treasurer, and the city clerk of said city of Sapulpa, were all offered in evidence, before the state banking board, when claim was presented for the payment of said deposit. (See pages 19 and 20 of the printed record.)

The state bank commissioner admitted that the bank book of said city treasurer was regular on its face, appeared to have been kept in the usual course of business, by the duly authorized officers of the bank; that it purported to contain all the items of deposit and checks with the bank, and that he did not question it, that the city treasurer and city clerk of the city of Sapulpa were men of integrity and he did not question their integrity or their testimony; that the bank book of the city treasurer would show whatever the

original books of the bank would show, and is a correct copy of same.

When pressed for his reason for refusing payment of the certificates of deposit sued on, his reason is contained in the following question and answer:

"Q. Then the only reason you can give why this deposit is not a legal deposit, is because you have not got the bank books to prove it

A. Yes, that is true."

(See pages 26 and 27 of printed record).

POINTS AND AUTHORITIES.

POINT ONE.

(a) A proceeding to obtain a judgment against officials in a representative capacity, payable out of a specific fund in their charge and control, is a proceeding to obtain a judgment for money not otherwise secured, within the meaning of the Federal Judiciary Act and confers jurisdiction upon the United States Court. And this is true although it may be necessary to resort to mandamus to enforce collection of the judgment when obtained.

Jordan v. Cass Co., 3 Dill., 185;

Cass Co. v. Johnston, 95 U. S. 360; 24 L. Ed. 416;

Davenport v. Dodge Co., 105 U. S. 237, 26 L. Ed., 1018.

(b) This is not an original proceeding for mandamus, but is an action to recover a judgment against the members of the state banking board in their representative capacity, collectible out of the depositors' guaranty fund, in their possession and control. And if the judgment is not paid, then as ancillary to the judgment a writ of mandamus is asked to compel the issuance of depositors' guaranty fund warrants, and to compel the levy and collection of such assessments against the state banks as is provided by law for the payment of the judgment.

Jordan v. Cass., 3 Dill., 185, cited and approved *in toto* in

Cass Co. v. Johnston, 95 U. S., 360, 24 L. Ed., 416;

Cass Co. v. Johnston, 95 U. S. 360, 24 L. Ed. 416;

Also approved in *Davenport v. Dodge Co.*, 105 U. S., 237, 26 L. Ed. 1018;

Aylesworth v. Gratiott, 43 Fed. 350, affirmed without opinion;

159 U. S. 40 L. Ed. 146;

Fuller v. Aylesworth, 75 Fed., 694;

Heidekoper v. Hadley, 177 Fed., 1 .

POINT TWO.

This is not a suit against the state of Oklahoma. An action against a state officer to compel him to perform duties prescribed by law, is not an action against the state. An officer who refuses to obey the law does not stand for the state, within the meaning of the Federal Constitution.

A sovereign state must be resumed to be willing that its laws shall be obeyed. Through its laws it speaks to its servants, and commands them to do something. Those servants by their acts of disobedience do not stand for or represent that state. This suit therefore, instead of being against the state, is against its servants to compel the performance of duties, which by their acceptance of the office, they obligated themselves to perform.

Heidekoper v. Hadley, 177 Fed., 1;

Lankford v. Oklahoma Eng. & Ptg. Co., 130 Pac., 278;

State v. Cockrell, 27 Okla., 630, 112 Pac., 1000.

Ralston v. Mo. Fund Commissioners, 120 U. S., 390, 30 L. Ed., 721;

Graham v. Folsom, 200 U. S., 248, 50 L. Ed., 464;

• *Taylor v. Louisville & N. R. Co.*, 88 Fed., 350, 31 C. C. A., 537;

Smith v. Ames, 169 U. S., 518, 42 L. Ed., 819;

Ex Parte Young, 209 U. S., 123, 52 L. Ed., 714.

POINT THREE.

The fact that the complainant may have a remedy in an original proceeding in mandamus in the state court for the cause of action alleged, will not deprive the complainant of the right to sue in equity in the federal court.

Smith v. Ames, 169 U. S., 518, 42 L. Ed., 819.

POINT FOUR.

The depositors' guaranty fund of the State of Oklahoma is not a part of the general state funds and is not under the control of, and cannot be used by the executive or legislative branches of the state government for general state purposes, or for any purpose whatever.

The fund is in the possession and control of the state Banking Board, and can be used solely for the purpose of paying depositors of failed banks, and a proceeding to recover a judgment for the depositor of a failed bank is not a proceeding against the state to enforce any liability of the state.

Danby v. State Treasurer, 39 Vt., 92;

Session Laws of Oklahoma, 1911, Chap. 31, Sec. 6;

Session Laws of Oklahoma, 1913, Chap. 22, Sec. 6.

POINT FIVE.

Depositors in failed banks have a justiciable right to enforce payment out of the depositors' guaranty fund.

Danby v. State Treasurer, 39 Vt., 92.

POINT SIX.

(a) This is not a suit on a certificate of deposit, as a negotiable instrument, but is a suit for money actually deposited. The fact that a certificate of deposit was accepted as evidence of the deposit, will not deprive the depositor of the right to be paid out of the depositors' guaranty fund.

(b) The holder of a time certificate of deposit is a "depositor" within the meaning of the State Bank Guaranty Law of Oklahoma.

Tiffany on Banks & Bankings, 75;

Williams v. Rogers, 77 Ky., 776;

Wilkes & Co. v. Arthur, (S. C.) 74 S. E., 361;

Lamar v. Taylor, (Ga.) 80 S. E., 1085.

ARGUMENT UNDER POINT ONE.

District courts of the United States have no power to issue writs of mandamus in an original action brought for the purpose of securing relief by the writ, as that proceeding is defined in the decisions of this court. But district courts of the United States have jurisdiction in a proceeding to establish a justiciable right where such right exists and to obtain a judgment adjudicating that right, although a money judgment is not sought against the defendants personally, but a judgment is sought against the defendants in their representative capacity, and payable out of a specific fund in their possession and control, and although such judgment could only be enforced by the issuance of a writ of mandamus.

A brief reference to the cases cited by the appellants in their brief on the question will illustrate the meaning and application of the rule.

In the case of *State ex rel. Knapp v. Lake Shore & Mich. Ry. Co.*, 197 U. S., 540; 49 L. Ed., 870, it is held that mandamus to compel the performance of specific acts, against the interstate commerce commissioners, was not mandatory. No other relief was asked than the issuance of the writ to compel the performance of the acts which were brought to compel the commissioners to perform.

The case of *Jabine v. Oats*, 115 Fed. 861, cited by the defendants, simply held that the appeal would not lie, from a judgment awarded on a writ of mandamus, because that is a proceeding at law, and not appealable.

Large v. Consolidated National Bank, 137 Fed. 168 was an

application to the Federal Court by a shareholder of the National Banking Association, for a writ of mandamus to compel the association to permit an inspection of a list of its stockholders. *Held* it could not be maintained.

The case of *Pensacola v. Lehman*, 57 Fed. 324 was a proceeding to enforce conveyance of certain real property by specific performance. It was held, incidentally that mandamus would not be a complete remedy at law, and therefore would not oust the Federal Court of equity jurisdiction by furnishing an adequate remedy at law.

The case of *Denton v. Baker*, 79 Fed. 189, held that the holder of a judgment against an insolvent bank recovered on a claim rejected by the receiver, has an adequate relief by an action at law against the receiver. This case does not appear to be in point.

Burnham v. Field 157 Fed. 246, was a proceeding in mandamus to require the defendant who was the duly elected and qualified clerk of Multnomah County, Oregon, to keep open his office for the receipt, filing and recording of deeds, etc.

But no adjudication of any justiciable right that could be the foundation of a money judgment, general or special, was involved.

The case of *Gates v. Northwestern National Builders Association* 55 Fed., 209, was a suit for mandamus to compel the defendant corporation to hold a stockholders' meeting for the election of directors. In that case no justiciable right that could be the basis of any money judgment, general or special, was involved.

The case of *State of Indiana v. Lake Erie Ry. Co.*, 55 Fed., 3, was an application by a city for a mandamus to compel the railroad company to reconstruct an over-head crossing. No justiciable right that could be the foundation of any money judgment, general or special, was involved in this action.

In re Forsyth, 78 Fed., 301, was an application for a writ of mandamus to compel the clerk of the court to deliver to the receiver of the Oregon & Pacific Ry. Co. the check drawn on a fund in the

registry of the court. Likewise in this case no justiciable right, which could be the foundation of a money judgment, either general or special, was involved.

The case of *Covington, etc., Bridge Co. v. Hager*, 203 U. S., 109; 51 L. Ed., 112 was a proceeding in mandamus to compel the return of a franchise tax collected under authority of a state statute. It was held the circuit court has no power to issue the writ of mandamus in an original proceeding brought for the purpose of securing relief by the writ, but have only power to issue such writ in aid of their jurisdiction in cases already pending.

It will be observed that in all of these cases the relief sought was not adjudication of any justiciable right of the plaintiff by a judgment and decree of the court showing those rights and in case such judgment or decree should not be complied with or performed by the defendant, that a writ of mandamus issue to enforce such judgment and decree, but the sole relief sought was the issuance of the writ, by which alone the federal court became possessed of jurisdiction.

As was said by Mr. Justice Day in 203 U. S., *supra*, the power to issue such writ is only in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means or other proceedings. In this case the jurisdiction of this court has not been acquired by the issuance of any original writ of mandamus. This is not a proceeding for the purpose of obtaining the issuance of an original writ of mandamus. This is a suit against the state banking board of Oklahoma, alleging facts entitling the plaintiff to a judgment and decree of this court adjudging and decreeing that plaintiff was a depositor in the Farmers & Merchants Bank, of Sapulpa, Oklahoma, and adjudging that as such depositor he is entitled to be paid his deposit out of the state bank guaranty fund in possession and control of the defendants, and adjudging that the defendants pay such claim out of said fund.

In other words, a judgment and decree of the court is sought

against the defendants in their representative capacity, for the amount of the complainant's deposit, and if the defendants fail or refuse to pay the judgment out of the funds available, or if there are no funds available applicable to the payment of the judgment, then ancillary to and in aid of the judgment of the court theretofore rendered, that the court issue its writ of mandamus to enforce the payment of the judgment by compelling the issuance of depositors' guaranty fund warrants, and to compel the levy and collection of such assessments as the law authorizes to be levied and collected for the purpose of paying the judgment. But the issuance of the writ of mandamus is subsequent to the rendition of the judgment and ancillary to, and in aid of the collection of the judgment. The issuance of the writ of mandamus is not sought or asked as a part of the original relief sought and is not sought, in any event until after the rendition of the judgment.

The foundation of the jurisdiction of the federal court is the assertion of a justiciable right to a judgment and decree against the defendants for the payment of money, either personally or against them in their representative capacity, out of funds for which they are accountable.

When a justiciable right is asserted which may become the foundation of a judgment and decree independent of the issuance of an original writ of mandamus, jurisdiction vests in the United States Court, even though the issuance of a writ of mandamus is necessary to carry out the execution of the judgment.

A leading case defining the jurisdiction of the United States Court to take jurisdiction to enforce justiciable rights, although mandamus would be the proper proceeding in a state court, where parties by reason of their citizenship are entitled to sue in the federal court, is found in the case of *Jordan v. Cass County*, 3 Dillon, 185, which holds:

"As townships were not incorporated bodies, the Act of March 23, 1868 above mentioned when the proposal has been adopted by

the voters of the township authorizing the county court to issue bonds *in the name of the county*, on behalf of the township voting the aid," *Held*, (construing the laws of Missouri), (1 that the owners of bonds thus issued by a county (or a township) had no remedy by action against the township or taxable inhabitants therein; (2) that the remedy of the owner of the bonds was by mandamus to the county court to compel it to levy and collect the special taxes which the act provided as the means to pay the bonds and interest thereon; (3) that such an owner could *sue the county* in whose name the bonds were issued, in the federal court and recover judgment thereon, but such judgment could not be enforced against the county or its property or the taxpayers of the county at large, but only by mandamus to the county court to compel the levy and collection of the special tax according to the statute in such cases provided.

The opinion was rendered by that eminent jurist, Judge Dillon. The precise question presented in the case at bar was in a very learned opinion fully considered and decided that wherever the plaintiff who by reason of his citizenship is entitled to adjudicate his rights in the federal court, has a justiciable right, which may be the foundation of a decree, although such judgment or decree will not be a general decree or judgment enforceable against the defendant except by the subsequent issuance of a writ of mandamus the federal court will take jurisdiction and adjudicate the rights of the parties, and subsequently and ancillary thereto, if necessary, issue its mandamus to enforce the decree and judgment, and the fact that the writ of mandamus is prayed for in the petition on trial, and the judgment and decree awards a writ of mandamus will not characterize the proceeding as an original mandamus proceeding and therefore not cognizable by the federal court.

In that case the county court had issued bonds for and on behalf of the township. The township was not incorporated and could not be sued. The county was in no way liable for the obliga-

tion. The only duty imposed on the county was to levy and collect the special taxes to pay the bonds, and the court held such proceeding, if brought in the state court was mandamus, but that the federal court would take jurisdiction and adjudicate the rights of the plaintiff against the county, and subsequently thereto issue its writ of mandamus to enforce the decree, if necessary.

In the course of the opinion Judge Dillon said:

"The legislature has provided, the mode of raising the means for the making payment of the bonds, which is by levying and collecting a *special tax* for that purpose, to be 'levied on all of the real estate lying within the township,' and it has especially enjoined on the county court the duty of levying and causing such special tax to be collected, and undoubtedly this is such a duty, as, supposing the bonds to be valid, may be enforced by mandamus. It is to our mind clear that the bond holder, if he chose to resort to the state tribunals, might without first obtaining a judgment against the county or township file information for a writ of mandamus to be directed to the county court to compel it to levy and cause to be collected the special taxes from which alone can come the funds that the law has provided for the payment of the bonds. Dillon on Municipal Corporations, Sec. 685, etc.

But this court has no original jurisdiction in mandamus; it cannot acquire jurisdiction by an original proceeding in mandamus. *But where jurisdiction otherwise exists it may issue the writ when necessary to the exercise of its jurisdiction agreeably to the principles and usages of law. Bath Co. v. Amey*, 14 Wallace, 244, *U. S. v. U. P. R. R. Co.*, 2 Dillon 527. Therefore the holder of these bonds cannot have any standing in the Federal Court, unless he is entitled to recover a judgment thereon and to enforce such judgment, if necessary by mandamus. This results not from any intrinsic difference in this respect between the State and Federal courts, but from the peculiar language in which the jurisdiction of the Circuit Court of the United States is conferred by the judiciary act.

We are thus brought to the question of whether the holders of the bonds issued pursuant to the act of March 23, 1868 may recover judgment thereon against the county in whose name they are issued, to be enforced if necessary, not by an execution against the county, but by mandamus against the county court to compel it to levy on the property in the town-

ship, the special tax which the law has enjoined as a duty upon it.

After some hesitation we have reached the conclusion that such an action will lie and that this view will best carry out the design of the legislature in the enactment in question."

After discussing the particular act in question at some length and holding in effect that the township was not liable to be sued for the payment of the bonds, and that the county could not be held liable for the payment of the bonds, it simply being the duty of the county court to levy and collect the special tax to pay the bonds, Judge Dillon said:

"The constitution will not be infringed upon by allowing the county to be sued, but the judgment we render is not the one that is to be satisfied out of the property of the county, if it owned any property, or can own any which is subject to taxation, or by a tax upon the people and property of the county at large. It seems to us that the provision that the bonds shall be issued in the name of the county, implies a liability on the county to be sued, so far as is necessary to give effect to the rights of the holders of the bonds, consistent with the provisions of the constitution. The right of the non-resident citizens to resort to the courts of the United States is one which is given by the constitution and laws, and is a right which the citizen would be apt to regard as especially desirable, where, if he is compelled to resort to the state courts, it must be to a county whose citizens in whole or in part are his real adversaries and who may constitute the jury to decide the case. This right so valuable to the plaintiff, but which deprives the defendant of no just advantage, since the Federal Courts, are by their constitution to stand wholly indifferent between all parties, ought not to be considered as unavailable to a non-resident citizen, unless a fair construction of the enactment applicable to the question so requires.

It is in our judgment practicable consistently with established legal principles to protect the constitutional rights of the counties, and at the same time to recognize the constitutional rights of the non-resident citizen, to come with these securities into court and have his rights in respect to them determined.

This is to be effected by the nature of the judgment we render, which is not a personal judgment against the county,

but only a judgment judicially establishing the plaintiff's debt, if no defense is successfully made.

If the debt shall be thus established we must suppose the proper county court will levy and collect from the property within the township, the necessary tax to pay the debt.

But if it should not, this court has the power, and in that event it would become its duty by mandamus to cause such tax to be levied and collected."

This view, in effect makes the county the trustee for the township which is one of the sub-divisions of the county, and a necessary party to the action, but not a party personally liable for the debt which the plaintiff may establish.

Later on in the opinion, Judge Dillon says:

"This, it is to be remembered is a law action and the judgment to be rendered which so far as the anomalous legislation under review will admit of it, is consistent with the restricted power and somewhat rigid rule of the common law courts.

But the common law adjudications show that the judgment may be molded so as to conform to the rights of the parties under the law, and by analogy support the view we take" (citing many authorities).

This opinion of Judge Dillon was approved *in toto* by this court in *Cass County v. Johnston*, 95 U. S., 360, 24 L. Ed., 416, 1 c. 418 where this court said:

"It is finally objected that, as the bonds are in fact the bonds of the township, no action can be maintained upon them against the county. Without undertaking to decide what would be the appropriate form of proceeding to enforce the obligation in the state court, it is sufficient to say that in the courts of the United States, we are entirely satisfied with the conclusion reached by the court below, and that a judgment may be rendered against the county to be enforced, if necessary by mandamus against the county court or the judges thereof, to compel the levy and collecting of a tax in accordance with the provisions of the law under which the bonds were issued. The rea-

soning of the learned Circuit Judge, in *Jordan v. Cass Co.*, 3 Dill., 185, is to our minds perfectly conclusive upon this subject and we content ourselves with a simple reference to that case as authority upon this point.

The judgment of the Circuit Court is affirmed."

Another leading case illustrating the application of the rule is *Aylesworth v. Gratiot County*, 43 Fed. 350.

In that case the court held:

"An action lies in the Federal Court upon drain orders drawn by a county drain commissioner, upon a county treasurer, though the orders themselves create no debt against the county and the sole duty of the county officers is to assess and collect the cost of constructing the drain from the owners of the property benefited by it. In such case the judgment is special, and is enforceable only by mandamus to compel the collection of the tax."

The opinion in this case was rendered by Judge Brown, later Justice Brown, of the Supreme Court of the United States. The opinion is a very able and learned one, and states the law so clearly that we quote from it extensively.

On pages 351 to 353 the court says:

"While this is nominally an action to recover the amount of these orders from the county, the real object is to procure the issue of a writ of mandamus for the collection of this tax from the property benefited by the drain. Several defenses are interposed, which I will proceed to consider in their order.

(1) That the orders created no obligation against the county. If by this it is intended merely to urge that the orders created no debt against the county which as a municipal corporation, it is bound to pay, the position taken is correct. It is well settled that, where public improvements are by law to be made at the expense of adjoining property, no charge against the corporation is created, and its only duty is to take necessary legal steps to collect the assessment, and to pay it to the parties justly entitled thereto. Thus it was held in the case of *Lave v. Trustee*, 4 Denio, 520, in an action upon an order given by the president of a village upon the treasurer to pay the con-

tractor a certain sum out of a particular fund, that the corporation was the agent or instrument of the land-holder having an interest in the matter, to ascertain how much each one ought to pay and another to receive, and to collect the money from those who were benefited, and see that it was properly applied to the particular object, and that this was the extent of its duty. It was held that the plaintiff could not recover generally against the corporation as for a debt, and it was intimated that the plaintiff had a remedy by mandamus, or by an action on the case against the trustee for neglect of duty. This is also an intimation of the Supreme Court in the case of *Ogden v. County of Daviess*, 102 U. S., 634. And I believe that the authorities are uniform to the effect that no action will lie against that county upon these obligations as for a debt chargeable against it. *Goodrich v. Detroit*, 12 Mich. 279; *Bank v. Lansing*, 25 Mich., 207. The proper remedy in this class of cases in the state court is by writ of mandamus to compel the assessment and collection of the tax by the officers charged with that duty, and the payment of the same to the party entitled thereto.

As a petition for a writ of mandamus in the federal court will not be entertained as an original proceeding, it was at one time supposed that no action or any kind would lie against a municipality. In the case of *Boro v. Phillips Co.*, 4 Dill. 216 it was held that the failure or refusal of the county to discharge its duty in such cases did not make it liable to a general judgment for the obligation of the particular district, and could not be made the foundation of an action against the county for a money judgment. This may be entirely true, and yet it does not follow that there is no remedy in the federal court where the plaintiff is entitled to sue therein by reason of his citizenship. The general rule is believed to be without exception that, where the plaintiff is otherwise entitled to relief in this court he will not be debarred therefrom by reason of the fact that his remedy in the state court, upon the same cause of action, would be of a character which we are not entitled to administer here. Hence it was held by Judge Dillon in the case of *Jordan v. Cass Co.*, 3 Dill., 185, that the holder of county bonds issued by a county court on behalf of a township voting aid to a railway might sue the county in the federal court and recover judgment thereon although such judgment could not be enforced against the county or its property, or the tax-payers of the county at large but only by mandamus to the county court to compel the levy and collection of the special tax, according to the statute, this is believed to be the earliest case upon the subject and the opinion is a very interesting and instructive

one. The case was approved in *County of Cass v. Johnson*, 95 U. S. 360, and was applied in the case of *Davenport v. County of Dodge*, 105 U. S. 237, to bonds issued to county commissioners on behalf of a precinct which had no corporate existence and could not contract or be contracted with. The court considered the bonds in this case as special bonds, which the county commissioners were to issue for the precinct, and that they were in legal effect the special bonds of the county, payable out of a special fund to be raised in a special way. Similar ruling was made in the case of *Blair v. Cuming Co.*, 111 U. S., 363, 4 Sup. Ct. Rep., 449. This case differs from the others in the fact that the bonds contained no promise by the county to pay, but a promise by the precinct, which had no corporate existence. Notwithstanding this, the county was held liable to the performance of the obligation." And again on pages 354 and 355 the court says:

"It is evident that under this act most ample powers are conferred on the board of supervisors with regard to the assessment and collection of these taxes, and in case of any dereliction of duties on their part there ought to be a remedy against the corporation, of which they are the authorized expression and agent. As before observed, the proper remedy in the state court is by mandamus. As this court is incompetent in the first instance, to afford this relief, we think an action may be brought against the county, and the collection of the judgment enforced by the same process of mandamus that would be resorted to if the proceedings had been instituted in the state court."

We have quoted thus extensively from this case because it cites and follows the leading case of *Jordan v. Cass*, 3 Dillon, *supra*, and this case was affirmed by the United States Supreme Court without rendering any opinion in 159 U. S., 59, L. Ed., Book 40, page 146.

It will be observed that in this case the court states:

"The proper remedy in the state court is by mandamus. As this court is incompetent in the first instance, to afford this relief, we think an action may be brought against the county, and the collection of the judgment enforced, by the same process of mandamus that would be resorted to if the proceeding had been instituted in the state court."

It will be observed that in this case the court held and it was admitted that the drain orders sued on created no debt against the county and that no money judgment could be rendered against the county, other than an adjudication of the rights of the plaintiff, as a basis for later proceedings by mandamus to compel the county board to assess and collect the special tax, the sole duty of the county officers being to assess and collect special taxes provided by law.

In other words, there is simply the assertion of the legal right of the plaintiffs who were the owners of the drain orders to have the county assess and collect the special taxes provided by law, and to have their rights adjudicated, and the federal court took jurisdiction and adjudicated their rights and rendered its decree against the county and as an ancillary proceeding, to and in aid of such decree, issued its writ of mandamus to enforce it, which is exactly the proceeding we now seek in the case at bar. The proceeding now before the court follows literally the doctrine laid down in the case of *Jordan v. Cass*, 3 Dillon, *supra*.

In the case of *Fuller v. Aylesworth*, 75 Fed., 694, the same doctrine is stated with great clearness in a very learned opinion rendered by Judge Taft. In that case will be found a very learned and clear definition, defining what is "a judgment for the recovery of money."

The court there held:

"That a judgment rendered against a county for the amount of certain drain warrants, with provision for mandamus to compel the levy of assessments according to law, upon the lands benefited by the drains, was one 'for the recovery of money not otherwise secured.'

A 'judgment for the recovery of money,' is one which adjudges a defendant either as an individual or in a representative capacity, absolutely liable to pay a sum certain to the plaintiff, and awards execution therefor, and which may be fully satisfied by the defendant by paying into court the amount adjudged, with interest and costs; and the fact that the judgment does not involve the personal liability of the defendant is immaterial."

This case grew out of the case of *Aylesworth v. Gratiot County*, 43 Fed., 350, *supra*, and was an action on the appeal bond given in that case.

It will be found interesting to read the judgment rendered by Justice Brown in *Aylesworth v. Gratiot Co.*, *supra*, which will be found quoted in full in the 75 Fed., at page 697, in which a money judgment adjudicating the rights of plaintiff to recover and be paid out of the funds available and the duty of the court to levy and assess the tax required by law to be levied and assessed, and on failure to perform such duties, the writ of mandamus shall issue to the board of supervisors of said county directing that the amount of said damages, costs and interest be levied and assessed as required by law, which is the precise form of the decree in the case at bar.

Judge Taft in his opinion (pages 698 to 701) says:

"The main controversy in the case is whether the judgment against Gratiot county which was superseded was 'a judgment for the recovery of money not otherwise secured.' If it was, then clearly the bond taken was in proper form, and rendered the sureties liable for the whole amount of the judgment in the circuit court. It is strenuously urged by counsel for the plaintiffs in error that the judgment is in reality not for money, but only for an order of mandamus on county officers to make a levy upon lands in certain specified township; that the county is in no sense responsible as a debtor for the amount established to be due, and that the only amount recoverable under the statute, and embraced by a lawful supersedeas bond, is for costs and damages for delay, which are not shown. It is settled by a long line of decisions of the supreme court that the circuit courts of the United States have no jurisdiction to consider and decide a suit for mandamus to compel the discharge of statutory or other duty except for the purpose of enforcing their judgments previously rendered. The result was reached by a construction of the eleventh and fourteenth sections of the judiciary Act, which now appears in the Revised Statutes as Section 629 and 716. The former confers on circuit courts original jurisdiction 'of all suits of a civil nature at common law,' and the latter provides 'that such courts shall have power to issue all writs not specifically provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.' The

supreme court was of opinion that while, if the eleventh section of the judiciary Act was not accompanied by the fourteenth, a mandamus proceeding might be properly regarded as a suit of a civil nature at common law, the presence of Section 14 in the same Act, providing for the issuance of such a writ as an ancillary writ, indicated that the words of Section 11 were to be given a narrower construction, and one which would not include suits in mandamus. Hence the uniform ruling of the supreme court has been that, even in states where by statute it is specifically provided that a mandamus may be issued against public officers to levy a tax to pay a public debt without other proceeding than an application for mandamus and a hearing thereon, such a statute does not apply to a circuit court of the United States, and that in those courts a judgment against a corporation liable for the debt must be rendered before a mandamus will issue. *Bath Co. v. Amy*, 13 Wall., 244; *Graham v. Norton*, 15 Wall., 427; *County of Greene v. Daniel*, 102 U. S., 187-195; *Davenport v. County of Dodge*, 105 U. S., 237; *Rosenbaum v. Bauer*, 120 U. S., 450; 7 Sup. Co. Rep., 633. It follows that the writ of mandamus in the circuit court is never an independent suit, as it is in many states and in England, but it is only 'a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract.' (*Riggs v. Johnson Co.*, 6 Wall., 166, 198.) In *County of Greene v. Daniel*, 102 U. S., 187, 195, it is said to be in the nature of an execution to carry the judgment into effect. In *Rosenbaum v. Bauer*, 120 U. S., 450, 7 Sup. Ct. Rep., 635, the court said: 'The issue of the mandamus is an award of execution on the judgment, and is a proceeding necessary to complete the jurisdiction exercised by rendering the judgment.' The result is that in the circuit courts of the United States there must be a judgment for the recovery of money before there can be a mandamus to levy a tax to pay it, and that the mandamus is only a form of executing the judgment. It was in obedience to this requirement that the plaintiff sought and obtained his judgment on the drain warrants. It was a judgment against the county for the recovery of money, and the recovery of the money was 'not otherwise secured,' than by the judgment itself. There was no property in the custody of the court, and none under any lien which this proceeding was brought to enforce and foreclose.

For these reasons we think the judgment was in the class referred to in Rule 29 of the supreme court, in which the bond

required to make the writ of error a supersedeas must be conditioned upon the payment of the amount of the judgment.

But it is vigorously pressed upon us that the debt for which the judgment was rendered was not the debt of the county, but that of the owners of certain lands in three townships, which were benefited by two ditches. It is true the county did not obligate itself in terms to pay these warrants, though they were drawn and approved by its officers; but the effect of Mr. Justice Brown's opinion and judgment in the original suit (43 Fed., 350) was, that by law it was the duty of the county to collect the tax upon these lands, and to pay the warrants out of the fund thus created; that, as there was no other corporate or *quasi* corporate body to represent the persons whose lands were benefited, the county was evidently intended by the law to be their representative, and, therefore, that the county was the proper defendant, as trustee and representative of the real debtors, against which a judgment might be entered as the essential foundation for a mandamus proceeding to enforce the collection of the proper taxes. Mr. Justice Brown followed in his opinion the reasoning and conclusion of Judge Dillon, in the case of *Jordan v. Cass Co.*, Fed. Cas. No. 7517, where there is a full consideration of the question of the propriety of entering a judgment against a county in the name of which bonds had been issued for one of its townships. The township was the real debtor, but it was not a corporation. The debt could only be paid by taxes levied upon the lands of the township. Judge Dillon was of opinion that a judgment ought to be rendered against the county, and that even within common law precedents it could be framed so as to effectuate the rights of the parties. He said:

'But the common law adjudications show that the judgment may be molded so as to conform to the rights of the parties under the law and by analogy support the view we take. Thus in *Peck v. Jenness*, 7 How., 612, where plaintiff attached the goods of his debtor before the latter was proceeded against in bankruptcy, and where, pending the action, the debtor was discharged, the Supreme Court of the United States held that it was competent and proper for the court to render a judgment, notwithstanding the discharge, for the amount of the debt, damages and costs, "to be levied only on the goods of the defendant attached on plaintiff's writ, and not otherwise." "The books," says Mr. Justice Grier in this case, "are full of precedents for such judgment." When an administrator pleads *plene administravit*, the plaintiff may admit the plea, and take judgment of assets *quando acciderint*.

When the defendant pleads a discharge of his person under an insolvent law, the plaintiff may confess the plea, and have judgment to be levied only of defendant's future effect. (*Peck v. Jenness*, 7 How., 623.) So, subsequently, the supreme court held that when contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars. (*Bronson v. Rodes*, 7 Wall., 229.) Upon the whole our judgment is that the action is well brought against the county; that the county may make defense, but if the plaintiff shall be found entitled to recover, he may have judgment against the county for his debts, damages and costs, to be enforced, if necessary, by mandamus against the county court, or the judges thereof, to compel them to levy and collect a special tax according to the statute in such case provided, and not otherwise. Demurrer overruled.

* The reasoning of Judge Dillon in this case met with the unqualified approval of the supreme court in *County of Cass v. Johnson*, 95 U. S., 360, and has been followed by this court in *Breckenridge Co. v. McCracken*, 22 U. S. App., 115, 9 C. C. A., 442, and 61 Fed., 191. The affirmation of Mr. Justice Brown's judgment in this case shows the concurrence of the supreme court in his view that the same principle was applicable to the drain warrants in this case which Judge Dillon had applied in respect to bonds issued for township purposes, in the name of the county. The theory on which the judgment against the county in such cases is entered is that the county is the trustee to apply a particular fund, when collected, to the payment of the indebtedness; and therefore that a judgment may properly be rendered against the county, to be made from the particular fund created by the levy of taxes on certain described lands. But we do not see how this limitation upon enforcing the judgment renders it any less a judgment for the recovery of money. A judgment against an executor, though it is *de bonis testatoria*, is none the less a judgment for the recovery of money. The fact that the judgment does not involve the personal liability of the defendant cannot affect its character as a money judgment. That is a money judgment which adjudges a defendant either as an individual or in a representative capacity, absolutely liable to pay a sum certain to the plaintiff, and awards execution therefor, and which may be fully satisfied by the defendant by paying into court the amount adjudged, with interest and costs. Thus tested, the original judgment rendered against Gratiot county was a money judgment, and it is not material that its enforcement was limited to process of taxation against cer-

tain lands in the county. It is true that Mr. Justice Brown, in his opinion, says, in effect, that such a judgment was practically only a formal means of procuring mandamus proceedings, and that the supreme court in *Davenport v. County of Dodge*, 105 U. S., 237, uses similar language; but this cannot, and was not intended, to change the exact legal character and effect of the judgment which was rendered. Certainly Mr. Justice Brown did not so intend, for he took the bond sued on in this case. It was not a judgment for a mandamus, because the circuit court is without jurisdiction to render such judgment. It is a judgment for money, which, not being enforceable except by mandamus, justifies the resort, under Section 716, to this ancillary writ by way of executing the judgment for money."

The pith of the proposition is most tersely stated by Judge Taft on page 700, where he says:

"The theory on which the judgment against the county in such cases is entered is that the county is the trustee to apply a particular fund, when collected, to the payment of the indebtedness; and therefore that the judgment may properly be rendered against the county, to be made from the particular fund created from the levy of taxes on certain described lands."

And again, he says:

"The fact that the judgment does not involve the personal liability of the defendant cannot affect its character as a money judgment. That is a money judgment which adjudges a defendant either as an individual or in a representative capacity absolutely liable to pay a sum certain to the plaintiff and awards execution therefor, and which may be fully satisfied by the defendant by paying into court the amount adjudged with interest and costs."

The case of *Huidekoper v. Hadley*, 177 Fed., 1, follows and illustrates and applies the same general rule. There the plaintiff alleged certain particular legal rights to have the state official perform the duties enjoined upon them by the state statutes; showed

that he would be injured by a failure of the said state officers to perform said legal duties.

The federal court did not acquire jurisdiction by issuance of its original writ of mandamus in that case, but acquired jurisdiction by the assertion of a legal right and the adjudication of that right and the rendering of its decree and the fact that thereafter its writ of mandamus was issued in aid thereof and the fact that the prayer for the writ was contained in the petition does not make it an original proceeding in mandamus, to which jurisdiction could not attach in the federal court. The prayer for the writ, and the issuance of the writ are ancillary to and in aid of the execution of the rights decreed by the court to vest in the plaintiff.

The petition in this case alleges that the plaintiff is a depositor in the Farmers & Merchants Bank, at Sapulpa, Oklahoma, and that as such it is entitled to be paid the amount of its deposit out of the depositors' guaranty fund of the state of Oklahoma, which is in the possession and under the control of the defendants, as members of the state banking board; that it is the duty of the defendants to pay plaintiff out of such fund and that such fund was created and exists, out of which he may be paid.

The prayer in the petition says:

"The plaintiff prays that upon a final hearing of this cause, a decree be entered herein ordering, adjudging and decreeing that the plaintiff is the owner of and entitled to said deposit and said certificate of deposit and interest thereon, and is entitled to have the same paid out of the depositors' guaranty fund, created under and by virtue of the laws of Oklahoma, and in the possession and under the supervision and management of the state banking board, composed of John J. Gerlach, A. D. Kennedy and W. F. Barber, defendants herein."

Those are the rights asserted and that is the remedy sought, namely, a judgment against the state banking board, adjudging and decreeing that the plaintiff is a depositor, and as such is enti-

tled to be paid out of the depositors' guaranty fund, in the possession of the defendants.

The petition further prays that in case the depositors' guaranty fund on hand is insufficient to pay the depositors of said bank, and other indebtedness chargeable against the same, that the plaintiff be and is entitled to have issued to plaintiff certificates of indebtedness, etc., and further prays that the defendants be ordered, commanded and required to levy an assessment as required by law.

The latter, of course, is the relief that would be sought if the banking board failed to perform the judgment rendered by the court adjudging them bound to pay the debt due the plaintiff.

No issuance of a writ of mandamus is prayed for before judgment is rendered. The jurisdiction of this court does not attach by reason of the issuance of any original writ of mandamus. A judgment is sought against the state banking board ordering, adjudging and decreeing the right of the plaintiff, and directing in case such judgment is rendered and is not performed by the state banking board that a writ of mandamus shall issue in aid of such judgment, to compel the state banking board to levy an assessment provided by law for the creation of the fund necessary for the relief given by the court, and such a judgment rendered against the state banking board, payable out of the depositors' guaranty fund in the possession of the state banking board, is a judgment "for the recovery of money" within the meaning of the law, as stated in *Fueller v. Aylesworth*, 75 Fed., *supra*.

ARGUMENT UNDER POINT TWO.

In the case of *Huidekoper v. Hadley*, 177 Fed., 1, it was held:

"The Missouri legislature to execute, Const., Art. 10, Sec. 3 (Ann. St. 1906, p. 275), providing that taxes shall be uniform on the same class of subjects within territorial limits of the authority levying the tax, provided a scheme for equaliz-

ing the valuation of property among all the counties of the state, based on actual value, by Rev. St. 1899, Sec. 9127 (Ann. St. 1906, p. 2116), and to work out such scheme, created a state board of equalization, by Const., Art. 10, Sec. 18 (Ann. St. 1906, p. 293), and by Rev. St., Sec. 9127, charged such board with the duty of equalizing property as classified by the legislature. *Held*, that such board had no discretion to divide the counties of the state into several groups and equalize the different classes of property only within each group, and hence mandamus was maintainable to compel the members of the board, other than the Governor, to equalize the assessment throughout the state."

In that case the state board of equalization was composed of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General, and were invested by the state with the power to equalize the value of property in the several counties in the state for the purpose of taxation.

It is worthy to note that the officials constituting this board of equalization were the heads of both the executive and the administrative departments of the state government, and the highest officers in the state, their powers and duties consisting of handling for the state, the state funds and in performing for the state the highest functions of state government, the equalization of property values, and collecting taxes, mandamus was to compel the board to act in a certain manner, claiming that the actions which they had taken, or were about to take were contrary to law, and that the exercise of their discretion was contrary to law.

It was there contended with great force and learning by its counsel that it was a suit against the state, the same as is contended for in this case.

We contend no better answer to that question can be found than in the learned opinion of the court in the above case, from which we quote at length (l. c. pages 5 to 8), which is as follows:

"Is this proceeding a suit against the state? Section 9140 Rev. St. Mo. 1899, (Ann. St. 1906, p. 4210) provides that the

assessor of each county shall take an oath to faithfully and impartially perform the duties of his office and to assess all the property in the county at what he believes to be its actual cash value.

Sections 9127 and 9195 provide that a statement or abstract of the taxes so assessed in each county shall be forwarded to the state auditor on blanks furnished by him, to be laid before the State Board of Equalization.

The Constitution of the state, (article 10, Sec. 18) creates the board and ordains that:

'There shall be a state board of equalization consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties of the state and it shall perform such other duties as are now or may be prescribed by law.'

Section 9126 provides that a majority of the members of the board shall constitute a quorum, and that the members shall each take an oath or affirmation that he will 'to the best of his knowledge and ability, equalize the valuation of real and personal property among the several counties in the state, according to the rules prescribed by this chapter for equalizing and valuing real property.'

Section 9127 provides that the board after receiving from the auditor abstracts or statements of all the taxable property in the state, and after classifying the same under certain headings shall proceed to equalize the valuation of each class thereof among the respective counties of the state in the following manner:

'First, it shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money, such per centum as will increase the same in each case to its true value. Second, it shall deduct from the valuation of each class, real or personal, of each county which it believes to be valued above its real value in money such per centum as will reduce the same in each case to its true value.'

This brief epitome of legislation clearly discloses that the policy of the state requires property to be assessed on the basis of its true value in money and that a duty is cast upon the State Board to equalize the property among the several counties of the state on that basis. Without now discussing the exact nature of that duty, its extent, or its limitations, it is sufficient, for our present purpose to observe that it is an imperative duty imposed by the law of the state. A majority of its members

constituting a working quorum refused to permit the board to perform that duty and compelled it to decline to do so. In so acting they did not stand for the state of Missouri and were not the state within the meaning of the eleventh amendment of the Constitution. A sovereign state must be presumed to be willing that its laws shall be obeyed. Through its laws it spoke to its servants and commanded them to do something. Certainly those servants by their act of disobedience do not represent or stand for the state. This suit, therefore, instead of being against the state, is against its servants to compel them to do a duty which, by accepting office they agreed to perform."

The gist of the whole matter is set out with great clearness by Judge Adams, in the opinion where he says:

"A sovereign state must be presumed to be willing that its laws shall be obeyed. Through its laws it spoke to its servants and commanded them to do something. Certainly those servants by their act of disobedience do not represent or stand for the state."

The state of Oklahoma, speaking through its laws created the state banking board, and directed it to supervise and control the depositors' guaranty fund, and placed said fund in its keeping, and the state through the same law commanded the state banking board to *pay all depositors of failed banks in full*.

If the state banking board violated the duties imposed upon it by the state of Oklahoma and failed to perform such duties, do they represent, and are they the state of Oklahoma, while so doing? On the contrary is it not true that the law was made to be enforced and that when they violate their duty they not only do not represent the state and are not the state of Oklahoma, but are acting in defiance of the law of the state that created them, and a proceeding to compel the performance of those duties is not only not a suit against the state, but in effect for the state to enforce the legal obligations created and imposed by the state. The sovereign state

being presumed not only to be willing that its laws should be obeyed, but interested in compelling obedience.

The many leading cases cited in this opinion fully illustrates the position of the supreme court in respect to this question, as well as the circuit court of appeals, and clearly distinguishes this class of cases from the cases which come under the 11th amendment of the Federal Constitution.

In what higher sense can it be claimed that the state banking board represents the state of Oklahoma than does the state board of equalization, composed of all of the state officers, and the highest representative of the state. The power to levy and collect taxes is the highest governmental power exercised by the state government. In the exercise of those powers lie the highest functions of state government. The taxes when levied and collected constitute the revenues of the state government, and are its property and belong solely and exclusively to the state for state purposes. Its very life is conditioned upon and its government depends upon the exercise of those powers. This is true both of state and federal government. The depositors' guaranty fund is not created for state purposes, but was created for a special purpose, namely to pay depositors of failed banks, and the same statute that created the depositors' guaranty fund placed the fund in the possession and under the control of the state banking board, and commanded them to pay all of the depositors of failed banks in full, out of that fund.

The fund was not created for and the money cannot be used for state purposes, under any conditions whatever. While the legal title to the funds may be in the state, but the state has no right to use it, or to dispose of it in any way, and has no control of it. It is under the control and management of the state banking board, and they can only use it to pay depositors of failed banks, or depositors' guaranty fund warrants, issued to the depositors of failed banks.

State officers in every department of the government in every

state within the Union, from the organization of its government down to the present time have been compelled by the highest courts in each and every state, and by the federal court, to perform the duties enjoined upon them by law, at the instance of those who may be injured by a failure to perform those duties. The Supreme Court of no state has ever refused to grant this remedy, and it is now too well settled law to be seriously questioned.

By what course of reasoning can it be held that the state banking board, vested with administrative and ministerial duties, prescribed by the statute creating it, to collect a specific fund, and commanding it to pay out that specific fund for a clearly defined and specific purpose, are higher and have greater powers and duties than the governmental powers exercised by state officials and state boards of equalization, or that they are immune from legal proceedings, and their acts can in no way be controlled by courts of law or equity; that they are higher than the law that created them, and their acts and proceedings are not amenable to law, or regulated or controlled by law.

The contention that a proceeding against the state banking board is a proceeding against the state is refuted completely by the cases of *Lankford v. Oklahoma Engraving & Printing Co.*, 130 Pac., 278, and *State v. Cochrell*, 27 Ok., 630, 112 Pac., 1000.

The first of these cases was a proceeding to enjoin the state bank commissioner, and the latter case was a proceeding by mandamus against the state bank inspector with reference to the performance of his official duties, both of which proceedings were held proper, by the supreme court of Oklahoma, and were not held to be proceedings against the state.

We desire to call the court's special attention to the language of Chief Justice Waite, in the case of *Rolston v. Missouri Fund Commissioners*, 120 U. S., 390, speaking of the case of *Louisiana v. Jumel*, 107 U. S., 711, which latter case is quoted by the Attorney General, in which Chief Justice Waite uses this language:

"But this case is entirely different from that. There (that is *La. v. Jumell*) the effort was to *compel a state officer to do what a statute prohibited him from doing*. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state." (This language will be found 177 Fed., 7.)

Rolston v. Fund Commissioners of Missouri, 120 U. S., 390, 30 L. Ed., 721 holds:

"A suit against a state officer to compel him to do what a statute requires of him is not a suit against the state, within the meaning of the Eleventh Amendment.

And the court speaking through Chief Justice Waite, on page 728 says:

"It is next contended that this suit cannot be maintained because it is in its effect a suit against the state which is prohibited by the Eleventh Amendment of the Constitution of the United States, and *Louisiana v. Jumell*, 107 U. S., 711 (27: 448), is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what the statute requires of him. The litigation is with the officer, not the state. The law makes it his duty to assign the liens in question to the trustees when they make a certain payment. The trustees c'aim they have made this payment. The officers say they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied."

This case is directly in point. The law makes it the duty of the state banking board to pay depositors of failed banks. Complainant says it is a depositor. The state banking board says it is

not. The only inquiry is therefore as to the fact of whether it is a depositor.

If complainant is a depositor, it is the duty of the state banking board to pay it. If the court finds that complainant is a depositor, then complainant is entitled to a decree.

Graham v. Folsom, 200 U. S., 248, 50 L. Ed., 464 holds:

"Mandamus to compel county auditors and county treasurers to levy a tax to pay a judgment on township bonds is not a suit against the state, within the inhibition of the Federal Constitution, because such officers have been forbidden by the state legislature to exercise any such power."

This court speaking through Mr. Justice McKenna, on page 469 says:

"It is further contended by plaintiff in error that this is, in effect a suit against the state. The argument to support this contention is that, if the auditor and treasurer are not corporate authorities, as it is insisted the circuit court decided they are necessarily 'state officer,' and, being state officers, this proceeding is an attempt to require of the state the performance of her contract." The reasoning by which this is attempted to be sustained is rather roundabout. It is based in part on distinctions which, it is contended, were made by the circuit court, and on the assumption that the circuit court decided that the levy of taxes prescribed by Sec. 9 of the statute under which the bonds were issued was a levy by the legislature and the taxing officers state officers. This proceeding, hence, it is argued, becomes a proceeding against the state, and 'the relief sought is to require of the state the performance of her contract,' by the coercion of her officers to the performance of duties which she has, by statute forbidden. And, it is said, it may be admitted that such statute 'is unconstitutional and therefore void;' nevertheless, the relief asked against the officers is 'affirmative official action,' which the political body of which they are the mere servants has forbidden them to exercise, and it is not competent for a court to compel them to

exercise, because of the immunity of the state from suit under the Constitution of the United States. To sustain these contentions an elaborate argument is presented and a number of cases cited. The most direct of the cases are *Louisiana v. Jumell*, 107 U. S., 711, 27 L. Ed., 448, 2 Sup., Ct. Rep., 128; *Hagood v. Southern*, 117 U. S., 52, 29 L. Ed., 805, 6 Sup. Ct. Rep., 608; *Rolston v. Missouri Fund Comrs.*, (*Rolston v. Crittenden*) 120 U. S., 411, 30 L. Ed., 728, 7 Sup., Ct. Rep., 599; *Re Ayers*, 123 U. S., 443, 31, L. Ed., 216, 8 Sup., Ct. Rep., 164; *Pennoyer v. McConnaughy*, 140, U. S., 1, 35, L. Ed., 363, 11 Sup., Ct. Rep., 699. It would make this opinion too long to review these cases. Nor is it necessary. It is enough to say that they do not sustain the contentions of plaintiff in error."

Smyth v. Ames, 169, U. S., 518, 42 L. Ed., 819 holds:

"A suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the state within the meaning of the 11th Constitutional Amendment."

This court speaking through Mr. Justice Harlan on page 839 says:

"But to prevent misapprehension, we add that within the meaning of the 11th Amendment of the Constitution the suits are not against the state but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a state from enforcing unconstitutional enactment to the injury of the plaintiff is not a suit against the state within the meaning of that Amendment. *Pennoyer v. McConnaughy*, 140, U. S., 1, 10 (35: 363, 365); *Re Tyler*, 149, U. S., 164, 190, (37: 689, 698); *Scott v. Donald* (No. 1), 165, U. S., 58, 68, (41: 632, 633); *Tindal v. Wesley*, 167, U. S., 204, 220 (42: 137, 142)."

Taylor et al. v. Louisville & N. R. Co., 88 Fed., 350 holds:

"A suit against state officers to enjoin them from certifying a tax, which they claimed to do by authority of the state, but which complainant avers to be without lawful authority, is not a suit against the state, within the meaning of the eleventh amendment."

Ex Parte Young, 209 U. S., 123, 52 L. Ed., 714, holds:

"A federal court may enjoin the attorney general of a state, whose general duty is to enforce the state statutes, from proceeding to enforce, against persons affected, a state statute which violates the Federal Constitution, such proceeding being not prohibited by the provision of the Federal Constitution forbidding the maintenance of action against a state."

And on pages 725 to 729 inclusive, the court speaking through Mr. Justice Peckham, reviews all the leading authorities on this question, and it would seem that the rule is settled that a proceeding against a state official to compel the performance of a duty enjoined on him by law, or to prevent the performance of a duty such official seeks to perform, alleged to be in violation of the law, is not a suit against the state, within the meaning of the Federal Constitution.

REVIEW OF AUTHORITIES CITED BY APPELLANTS.

Decatur v. Paulding, 14 Pet., 497, 10 L. Ed., 559 cited by appellants, is not in point.

The gist of that case is stated in the opinion by Mr. Justice Ketron, on pages 570 and 571 where he says:

"Stripped of the slight disguise of legal forms such is the case before us; the conflict between the executive and judiciary department could not well be more direct nor more dangerous. The idea that they are distinct, and their duties separate, is confounded, if the jurisdiction of the court below is sustained;

placing the executive power at its mercy, in case of all contested claims. Few can be more contested than the one before us; if jurisdiction can be exercised in this instance, it is difficult to see in what others it does not exist; to establish which we will briefly recapitulate the leading facts. On the 3rd of March, 1837, a resolution was passed by Congress giving a pension of the half pay of the late Captain Decatur to the petitioner, his widow; and on the same day a bill passed giving an equal pension to all the widows of naval officers and seamen who had died in the service; with this difference in the general law and the resolution, that by the former the half pay continued for life, and by the resolution only for five years, if the petitioner so long lived and continued a widow. She claims by her petition not only the half monthly pay proper of a post captain of the navy, but for daily rations, eight, at twenty-five cents each amounting to one half of seven hundred and thirty dollars per annum, and also interest on the sum withheld. These claims for back rations and interest are contrary to the construction given by the government to the navy pension acts, for more than forty years. To cover a failure, should the court concur with the executive departments in rejecting these claims, the petition has a double aspect in the form of a bill in equity; first, praying for the whole sum of eighteen thousand five hundred and ninety-seven dollars, or such part or portion thereof as the court may direct.

It was first called on to decide whether the United States owed the petitioner anything; second, how much; and, third, whether there was any money in the treasury belonging to the navy fund, out of which the claim could then be satisfied.

* * *

But the great question was decided below that the court have jurisdiction and power to order money to be paid out of the Treasury of the United States, by a writ in the nature of an execution, running in the name of the United States, commanding the government to obey its own authority.

* * *

I maintain the executive power of this nation headed by the president and divided into departments in its administration of the finances of the country, acts independent of the courts of justice in paying the public creditors, and that the decision of the Secretary of the Navy in this case, affirmed by the President, under the advice of the Attorney General, was final on the laws as they stood, and that the petitioner could only appeal to Congress."

The United States Court is asked in this case to control by mandamus the exercise of the executive power of the nation headed by the President, and divided into departments in its administration of the finances of the country. The government was asked to issue a writ in the nature of an execution running in the name of the United States commanding the government to obey its own authority, ordering money to be paid out of the United States treasury.

In the case of *Governor of Georgia v. Madrazo*, 1 Pet., 110, 7 L. Ed., 73, the court held that a proceeding against the governor of Georgia in his official capacity, for property in his possession as Governor was a proceeding against the state.

Mr. Justice Marshall on pages 79 and 80 says:

"The claim upon the Governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially.

The decree is pronounced not against the person, but against the officer, and appeared to have been pronounced against the successor of the original defendant, as the appealed bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant. This not being a proceeding against the thing, but against the person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

But were it to be so admitted that the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the state, made for the purpose of giving effect to an Act of Congress, and has done nothing in violation of any law of the United States.

The decree is not considered as made in a case in which

the governor was a defendant in his personal character; nor could a decree against him in that character, be supported.

The decree cannot be sustained as against the state, because, if the 11th amendment to the constitution does not extend to proceeding in admiralty, it was a case for the original jurisdiction of the Supreme Court. It cannot be sustained as a suit prosecuted not against the state, but against the thing, because the thing was not in possession of the District Court."

Smith v. Reeves, 178 U. S., 436, 44 L. Ed., 1140, was a proceeding against the state treasurer of California, to enforce the liability of the state to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the state from the plaintiff.

Mr. Justice Harlan in rendering the opinion said, pages 1142-1143:

"Is this a suit to be regarded as one against the state of California? The adjudged cases permit only one answer to this question. Although the state as such, is not made a party defendant, the suit is against one of its officers, as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint. This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. *Tindal v. Wesley*, 167 U. S., 204, 221, 42 L. Ed., 137, 143, 17 Sup., Ct. Rep., 770, and authorities cited. In the present case the action is not to recover specific moneys in the hands of the state treasurer, nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the state to pay a certain amount of money on account of the payment

of taxes alleged to have been wrongfully exacted by the state from the plaintiff. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their person or property, but one in effect to compel the state, through its officer, to perform its promise to return to tax payers such amount as may be adjudged to have been taken from them under an illegal assessment.

The case in some material aspects is like that of *Louisiana v. Jumell*, 107 U. S., 711, 726, 728, 27 L. Ed., 448, 453, 454, 2 Sup., Ct. Rep., 128, 140, 142. That was a proceeding by mandamus against officers of Louisiana to compel them to use the public moneys in the state treasury for the retirement of certain bonds issued by the state, but which it subsequently refused to recognize as valid obligations and directed its officers not to pay. This court said, "It may be, without doubt, easily ascertained from the accounts how much of the money on hand is applicable to the payment of this class of debts; but the law nowhere requires the setting apart of this fund any more than others from the common stock. In the treasury all funds are mingled together, and kept so until called for to meet specific demands. * * * The remedy sought, in order to be complete, would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest were paid in full, and that, too, in a proceeding in which the state, as a state, was not and could not be made a party. It needs no further argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a state submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this court is very far from authorizing the courts when a state cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the state. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.

We are clearly of the opinion that within the meaning of the constitutional provisions relating to actions instituted by

private persons against a state, this suit, though in form against an officer of the state, is against the state itself. *Re Ayers*, 123 U. S., 443, 31 L. Ed., 216, 8 Sup., Ct. Rep., 164, *Pennoyer v. McConnaughy*, 140 U. S., 1, 10, 35 L. Ed., 363, 365, 11 Sup., Ct. Rep., 699."

This case was not a proceeding to recover a specific fund in the possession of the treasurer of the state, nor to compel the application of a specific fund, already in his possession as treasurer to the uses for which they were deposited with him. But this case was a general claim payable out of the general state funds in his charge.

In this case as in the *Jumel* case, *supra*, there is no law requiring the treasurer to pay the amount out of the common fund. In the treasury all funds are mingled together and kept so. The general state funds in the possession of the Treasurer are subject to the control of the executive and legislative branches of the state government and the court in order to grant and make effective the remedy sought would be required to assume and exercise the executive authority of the state.

In the case at bar the depositors' guaranty fund is not a part of the general state funds in the possession of the state treasurer; is not mingled with other state funds; is not applicable to, or usable by the state to pay state debts or obligations, but is kept separate from all other funds, and created solely by the assessment of state banks, placed in the exclusive possession and control of the state banking board, who are its sole custodians, and who are not the legal custodians of any other state funds whatever, and the fund is applicable solely to the payment of depositors of failed banks. No other use can be legally made of it by the state banking board, or by the state, or by any official of the state. The obligations payable out of this fund—namely the depositors of failed banks are not obligations of the state. The state being in nowise legally bound

to pay them. The fund itself is not created by the state by the exercise of the power of taxation, and could not be.

The fund is created by the exercise of the police power of the state for the protection of the depositors of failed banks, and for no other purpose, and cannot be used for any other purpose otherwise the purpose of its creation wholly fails.

In the case of *Re Ayers*, 123 U. S., 443, 31 L. Ed., 216, the state of Virginia issued a large number of bonds bearing interest coupons which she thereby contracted should be received in payment of all taxes, etc., due to her.

In that case the court held:

"A suit by aliens, the object of which is to enjoin the Attorney General and the Commonwealth's attorneys of the several counties, cities and towns of Virginia from bringing any suit in the name of the Commonwealth to enforce the collection of taxes for the payment of which coupons originally attached to her bonds had been rendered, is a suit which the Circuit Court of the United States had no jurisdiction to entertain; such suit is, in law and fact a suit by subjects of a foreign state against the State of Virginia, and within the prohibition of the Eleventh Amendment to the Constitution.

For a breach of its contract by the state, there is no remedy by suit against the state itself; and a bill the object of which is by injunction indirectly to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, is a suit against the state.

In such case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still in substance, though not in form, a suit against the state."

This case is clearly not applicable to the case at bar. The case at bar is not a proceeding to enforce payment of any debt or contractual liability of the state of Oklahoma whatever. The obligation to pay the depositors of failed banks is not a state debt or

liability of the state of Oklahoma. The state is not in any event liable therefor. The state has not contracted or agreed in any event to become liable therefor. By a provision in the Bank Guaranty Law itself the state is relieved from all liability therefor. By the provisions of that law the fund is created by assessing the banks to be benefited, and that fund is made payable to the depositors of failed banks, and when the fund is exhausted, or when insufficient funds have been collected by assessment of banks, then the depositors of failed banks must lose.

The case of *Pennoyer v. McConnaughy*, 140 U. S., 1, 35 L. Ed., 363 holds, that a suit against the officers of a state to compel them to do acts which constitute the performance by it of its contracts, is, in effect, a suit against the state itself.

This case is wholly inapplicable to the case at bar. The case at bar is not a proceeding to compel the officers of the state of Oklahoma to perform any contract of that state. The duty to pay depositors of failed banks is not a contractual obligation of the state of Oklahoma, and is not an obligation of the state at all. It is a duty imposed upon the state banking board, and which by accepting the office, they agreed and became bound to perform.

Louisiana v. Jumel, 107 U. S., 711, 27 L. Ed., 448, was cited by Mr. Chief Justice Waite in *Rolston v. Crittenden*, 120 U. S., 390, 30 L. Ed., 720, in which he said:

"This case is entirely different from that (*La. v. Jumel*). There the effort was to compel a state officer to do what the statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer and not the state."

Appellants cite *La. v. Jumel*, *supra*, in support of their contention that the depositors' guaranty fund is a state fund, and that a proceeding to compel payment out of it is in fact a proceeding against the state.

In the Jumell case the proceeding was against the board of liquidation composed of the governor and all executive officers of the state. Mr. Chief Justice Waite in his opinion, (27 L. Ed., 448, 1. c., 452 and 453) says:

"The individual defendants are the several officers of the state, who, under the law, compose the board of liquidation. That board is, in no sense, a custodian of this fund. Its duty was to negotiate the exchange of the new bonds for the old on the terms proposed. It had nothing to do with levying the tax, collecting the money or paying it out, further than by purchasing the bonds with any surplus there might be from time to time in the treasury over what was required to meet the interest. * * *

The Treasurer of State is the keeper of the treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax collectors and paid over to the state treasurer, that is to say, into the state treasury, just as other taxes were then collected. The treasurer is no more a trustee of these moneys than he is of all other public moneys. * * *

In *Board of Liquidation v. McComb*, 92 U. S., 531 (XXIII, 623), which arose under the same Act of 1874, that we are now considering, the board of liquidation was enjoined at the instance of bondholders from admitting to the privileges of the compromise proposed by the state, certain persons other than those originally provided for in different terms. And this clearly because the board of liquidation was by the very terms of the law charged with the duty of exchanging the bonds specifically set apart by the contract for a particular purpose, and every *bona fide* bondholder by accepting the compromise offered, became personally interested in securing the due administration of the trust which had thus been committed to the board. In fact, the board held the new issue of bonds in trust, and everyone who gave up his old obligations and accepted the new in settlement, became a beneficiary under the trust and might act accordingly.

In this case, however, there is no such trust. As has already been said, the board is charged with no duty in respect to the taxes, except in connection with the purchase of bonds, whenever there are funds which can be used in that way."

It thus appears there is no separate fund created and placed in the possession of the board, coupled with a mandatory duty prescribed by law, with reference to its payment, as in the case at bar.

Cunningham v. Macon & Brunswick Ry. Co., 109 U. S., 446, 27 L. Ed., 992, was a proceeding against the governor and other officers of the state of Georgia, and an effort to enforce the contractual obligations of the state guaranteeing payment of railroad bonds, where the title to the property securing the bonds was in the state.

In *Murray v. Wilson Distilling Co.*, 213 U. S., 150, 53 L. Ed., 742, the State of South Carolina engaged in the business of buying and selling liquor. The Supreme Court of South Carolina in that case said, in *State ex rel. Hay v. Farnum*, 73 S. C., 165, 53 S. E., 83:

"The offices and place of business of the dispensary stand precisely in the same relation to the state as the state treasurer's office."

And speaking of the dispensary system, it was said:

"The state has undertaken to take charge of the entire liquor business of the state, and to prohibit any private person or corporation from dealing in liquor, except as they may find warrant in the Constitution and laws of the United States."

Mr. Justice White in the opinion, on page 750, says:

"If we consider as an original question the provisions of the Constitution of South Carolina on the subject, and the terms of the statutes of that state, establishing the dispensary system, we think it is apparent that the purchases which were made by the state officers or agent, of liquor for consumption in South Carolina, were purchases made by the state for its account, and that the relation of debtor and creditor arose from such transactions between the state and the person who sold the liquor. And this irresistible conclusion arising from the very face of the Constitution and statutes, is removed beyond all possible controversy by the decision of this court in *Vance*

v. *W. A. Vandercook Co.*, 170 U. S., 438, 42 L. Ed., 1100, 18 Sup. Ct. Rep., 674, and by the construction given by the Supreme Court of South Carolina to the state statute prior to the commencement of this litigation in *State ex rel. Hay v. Far-num*, 73 S. C., 165, 53 S. E. 83, as well as by the convincing opinion expressed by that court in reviewing the state statutes in the mandamus case already referred to, as reported in 79 S. C., 316, 60 S. E., 928.

We could not therefore sustain the exercise of jurisdiction by the circuit court without in effect deciding that the state can be compelled by compulsory judicial process to perform a contract obligation."

It thus appears beyond question by both the decision of the Supreme Court of South Carolina and this court that debts created by the purchase of liquor were state debts, and relations existing between the state and creditors were contract obligations and funds derived from the sale of liquor were the property of the state, and *were placed in its general revenue* the same as other state funds in the possession of the state treasurer, and subject to the control of the executive and legislative branches of the state government, the same as all other state funds, and could be used by the state for all fiscal purposes.

And this court held further that the winding up Act of 1907 did not change the relation of debtor and creditor between the state and the seller of liquor, and the state did not thereby renounce its control over the assets of the state dispensary.

ARGUMENT UNDER POINT THREE.

Smyth v. Ames, 169 U. S., 518, 42 L. Ed., 819, holds:

"One who has a right to sue in equity in a federal court cannot be deprived of that right because he can sue at law in a state court on the same cause of action."

On page 838 this court in a very learned opinion fully covers this subject, and we quote at length from the opinion where the court says:

"The first question to be considered is one common to all cases. While it was not objected at the argument that there had been any departure from the 94th equity rule, it was contended that the plaintiffs had an adequate remedy at law, and that the Circuit Court of the United States sitting in equity, was therefore without jurisdiction. This objection is based upon the 5th section of the Nebraska statute authorizing any railroad company to show, in a proper action brought in the supreme court of the state, that the rates therein prescribed are unreasonable and unjust, and if the court found such to be the fact, to obtain an order upon the board of transportation permitting the rates to be raised to any sum in the discretion of that board, provided that in no case should they be fixed at a higher sum than was charged by the company on the 1st day of January, 1893. This section, it is contended, took from the Circuit Court of the United States its equity jurisdiction in respect to the rates prescribed and required the dismissal of the bills.

We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court, is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the circuit courts of the United States. *Case of Broderick's Will (Kieley v. McGlynn)*, 88 U. S., 21 Wall, 503, 520 (22:599, 606); *Holland v. Challen*, 110 U. S., 15, 24 (28:52, 56); *Dick v. Foraker*, 165 U. S., 404, 415 (39:201, 205); *Bardon v. Land & River Improv. Co.*, 157 U. S., 327, 330 (39:719, 721); *Rich v. Braxton*, 158 U. S., 375, 405 (39:1022, 1032). But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper court of the United States when-

ever jurisdiction attaches by reason of diverse citizenship or upon any other ground of federal jurisdiction. *Payne v. Hook*, 74 U. S., 7 Wall., 425, 430 (19:260, 262); *McConihay v. Wright*, 121 U. S., 201, 205 (30:932, 933). A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state court of the same locality; that the wise policy of the Constitution gives him a choice of tribunals.

Davis v. Gray, 83 U. S., 16 Wall., 203, 221 (21:447, 453); *Cowley v. Northern Pacific Railroad Co.*, 159 U. S., 569, 583 (40:263, 267). So wherever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory, invaded by unauthorized acts of its own officers, to suits for redress in its own courts. *Reagan v. Farmers Loan & Trust Co.*, (No. 1), 154 U. S., 362, 391 (38:1014, 1021, 4 Inters. Com. Rep., 560); *Mississippi Mills v. Cohn*, 150 U. S., 202, 204 (37:1052, 1053); *Cowles v. Mercer County*, (*Mercer County Supers. v. Cowles*), 74 U. S., 7 Wall., 118 (19:86); *Lincoln County v. Luning*, 133 U. S., 529 (33:766); *Scott v. Neely*, 140 U. S., 106 (35:358); *Chicot County v. Sherwood*, 148 U. S., 529 (37:546); *Cates v. Alton*, 149 U. S., 45 (37:801)."

ARGUMENT UNDER POINT FOUR.

The statute creating the depositors' guaranty fund and defining its use provides:

"Section 3. There is hereby levied against the capital stock of each and every bank organized and existing under the laws of this state, an annual assessment equal to one-fifth of one per cent., and no more, of its average daily deposits during its continuance as a banking corporation, for the purpose of creating a depositor's guaranty fund; provided, that the state banking board in their discretion may levy an additional special assessment of one-fifth of one per centum as provided herein during the fiscal years ending June 30th, 1914; June 30, 1915, and June 30, 1916. Such fund so created shall be known

as the Depositors' Guaranty Fund of the State of Oklahoma, and shall be used solely for the purpose of liquidating deposits of failed banks, and retiring warrants provided for in this Act."

Sections six and eight of the Banking Law are as follows:

"Section 6. In the event that the Bank Commissioner shall take possession of any bank or trust company which is subject to the provisions of this Act, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company, is insufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in Section 2, the amount necessary to make up the deficiency and the state shall have for the benefit of the depositors' guaranty fund a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund.

* * *

Section 8. The Bank Commissioner shall deliver to each bank or trust company that has complied with the provisions of this Act, a certificate stating that said bank or trust company has complied with the laws of this state for the protection of bank depositors, and that safety of its depositors is guaranteed by the Depositors' Guaranty Fund of the State of Oklahoma. Such certificate shall be conspicuously displayed in its place of business and said bank or trust company may print or engrave on its stationery and advertising matter words to the effect that its depositors are protected by the Depositors' Guaranty Fund of the State of Oklahoma. Provided, however, that hereafter all banks operating under the guaranty law of the state of Oklahoma shall be permitted to advertise that their deposits are guaranteed by the depositors' guaranty fund, but that no bank shall be permitted to advertise its deposits are guaranteed by the State of Oklahoma, and any bank or bank officer or employee who shall advertise their deposits as guaranteed by the State of Oklahoma, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding Five Hundred (\$500.00) Dollars, or by imprisonment in the county jail for thirty days or by both such fine and imprisonment in the discretion of the trial court."

The depositors' guaranty fund is created solely by the assessment of state banks. When a state bank fails, the law commands the state banking board to pay the depositors in full out of the depositors' guaranty fund.

The state is given a line on the assets of failed banks for the benefit of the depositors' guaranty fund for money paid to the depositors of failed banks. The law provides that the depositors' guaranty fund "shall be used for the purpose of liquidating deposits of failed banks, and retiring warrants provided for in this Act."

The fund is not created by exercising the taxing power of the state. Neither is the fund subject to any other use whatsoever by the executive or legislative branches of the government. It cannot be used to pay state indebtedness, or any expenses of the state government, or any general state purpose. It cannot be made a part of, nor mixed with, the state funds in the state treasury.

The State of Oklahoma does not possess and cannot exercise over this fund any of the rights and powers which it possesses and exercises over all state funds. In fact, the state of Oklahoma does not own this fund and does not possess nor exercise any power over its distribution, except to apply it to the use to which the fund, by the law of its creation is applicable, namely, to the payment of depositors of failed banks. When the state banks of Oklahoma have paid their assessments into this fund, under the law creating it, any act of the State of Oklahoma, or any of its officers, diverting or applying that fund to any other use than that provided in the law creating it, would be clearly unconstitutional and void.

The equitable and beneficial title to the depositors' guaranty fund is in the state banks who created it by paying their assessments into it, and the depositors of failed banks, who have the right to be paid the full amount of their deposits out of the depositor's guaranty fund. The state has no beneficent interest in it whatever.

In case the purpose for which it was created should be given

up, or in case it should not prove necessary to expend the entire fund to subserve the purpose of its creation, namely, to pay depositors of failed banks, no part of the fund would become the property of the state. It would still remain the property of the banks who created it.

This court speaking through Mr. Justice Holmes in the case of *Noble State Bank v. Haskell*, 219 U. S., 104, 55 L. Ed., 112, says:

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to the return of what remained of it, if the purpose were given up (see *Danby Bank v. State Treasurer*, 39 Vt., 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark v. Nash*, 198 U. S., 361, 49 L. Ed., 1085, 25 Sup. Ct. Rep., 676, 4 A. & M. Ann. Cas., 1171; *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S., 527, 531, 50 L. Ed., 581, 583, 26 Sup. Ct. Rep., 301, 4 A. & E. Ann. Cas., 1174; *Offield v. N. Y., N. H. & H. R. Co.*, 203 U. S., 51 L. Ed., 231, 27 Sup. Ct. Rep., 72; *Bacon v. Walker*, 204 U. S., 311, 315, 51 L. Ed., 499, 501, 27 Sup. Ct. Rep., 289."

The basis of the constitutionality of the Act itself, as being a proper exercise of the police power of the state is that the purpose of the law is, as stated by Mr. Justice Holmes, to make the currency of checks secure, and to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand.

If the depositors' guaranty fund when created cannot be made available for the paying of depositors in failed banks, then neither object of the law has been made effective, the depositors of failed banks are not made secure, and the compulsory resort of depositors to banks, has not been made safe, and the purpose of the law wholly fails.

If a depositor has no justiciable right recognizable or enforceable in courts of justice, and if a depositor cannot be paid out of the funds provided for that purpose, then he is without remedy and the fund itself ceases to be any security for his deposit, for he has no method recognizable by law for enforcing his claim.

This court speaking through Mr. Justice Holmes, in case of *Noble State Bank v. Haskell*, *supra*, recognized the fundamental right of the depositors and banks contributing to the fund to have depositors paid out of the fund as the basis of the decision itself, holding that the Act is constitutional, and says: "We should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up," and he cites and approves the only case we have been able to find in the books, directly in point, namely, *Danby Bank v. State Treasurer*, 39 Vt., 92.

In the case of *Danby Bank v. State Treasurer*, 39 Vt., 92, the court holds:

"When a bank ceases to do business in consequence of its insolvency, the bank fund then becomes chargeable for the indebtedness of the bank in excess of its property and assets.

It is the duty of the state treasurer to pay over to a receiver of an insolvent bank so much of the bank fund as may be in the hands of the treasurer under the statute, and necessary to pay such indebtedness, upon the order of the court chancery.

The treasurer holds the money constituting the bank fund in which the state has no property, and he is charged with special duties in respect thereto."

The court therefore holds that mandamus is the proper remedy to compel the treasurer to pay over the funds.

And in rendering the opinion (page 98) the court said:

"The mode of creating the 'bank fund' and of continuing and replenishing it, in connection with the purposes for which it was created, and the provisions for administering it, shows clearly that it was designed to be and remain perpetual, subject to the purposes and provisions of law. The statute provides only two modes for appropriating and withdrawing money from that fund; one in payment of the debts of an insolvent bank, the other—in Sec. 13 of the chapter on banks in the compiled statutes—in repayment to a bank, of which the charter has expired, its proportional share of said fund."

And on pages 100 and 101 the court said:

"It is obvious from what has now been said, that, in the opinion of the court, it is the right of the receiver to have, and the duty of the treasurer to pay over to him so much of the 'bank fund' as is now in the hands of the treasurer under the statute, charged by the order of the court of chancery. To this extent the court has no doubt that a peremptory writ should issue. * * *

We think the treasurer holds the money as a specific fund in which the state has no property. He is charged with special duties in respect to that fund, and becomes responsible for the proper discharge of those duties. Whether in virtue of his official responsibility and his liability under his official bond to respond for his official defaults, the state sustains such a relation as to render it, in supposable cases, his duty to make good any deficiency in the 'bank fund,' the courts are called upon to decide or express views. For present purposes it need only be added, that all the provisions of the statute upon the subject, preclude the idea of that fund being absorbed by the state as a part of its general assets, with only the duty on the part of the state to permit an equal amount

to be taken from the treasury to answer the purposes of the statute as to that fund. * * *

In the next place the order can properly extend only to require him to do what it is his clear ministerial duty to do. That ministerial duty must be regarded as limited to the paying over of funds in his hands."

The fund in this is in all similar respects created in the same manner and for the same general purposes as in the case at bar. It is created by requiring the state banks to contribute to it and for the purpose of paying the debts of failed banks.

It should be further noted in this case that the contributions to the fund being placed in charge of a special officer, and only created for that purpose, it is deposited with the state treasurer, although the statute requires the state treasurer to keep the fund separate from the general state funds.

The court held, and we think very properly, that the fund is in no sense the property of the state; that the state has no interest in it; that the fund belongs to the banks who had contributed to its creation, and the depositors to whom it was payable, and that they have the absolute right to enforce payment out of this fund, and that it is the plain legal duty of the state treasurer to pay out of this fund, the debts of failed banks. And not only that, but the court holds that this duty is "a clear ministerial duty" and enforceable by mandamus.

REVIEW OF AUTHORITIES CITED BY APPELLANTS.

The case of *State v. Cochrell*, 27 Oklahoma, 630, 112 Pac. Rep., 1000, cited by appellants, is a case where the state examiner and inspector of the State of Oklahoma, sought by mandamus to compel the state bank commissioner to permit him to inspect the records kept by the state bank commissioner, concerning the Columbia Bank & Trust Company, a failed bank, whose assets had been taken charge of by the state bank commissioner.

The law prescribing the duties of the examiner, provides:

"The examiner and inspector shall examine the books and records of state officers, whose duty it is to collect and distribute funds of the state, or under its management, at least once each year."

The sole question before the court was a construction of this statute and the power of the state examiner and inspector. Every expression in the opinion, outside of that issue was *arbiter dicta*. The court in its opinion said:

"The control of the depositors' guaranty fund vests in the state just as much as the school land, or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance of the schools, *all of which are held in trust by the state for a specific purpose*. But even if it were not a special fund, it would at least be a fund 'under the management of the state.'"

The court does not decide that the depositors' guaranty fund belongs to the state of Oklahoma, for general purposes or that it is any part of the general state funds, or that it is usable by the state for general purposes at all. But holds in effect that the depositors' guaranty fund is held by the state for a specific purpose.

The statement of the court that the depositors' guaranty fund is held by the state for a specific purpose comports with the opinion of Mr. Justice Holmes, *supra*, in *Noble State Bank v. Haskell*, to the effect that the banks contributing to this fund have a reversionary interest in it, and likewise the depositors have the right to have the fund used for the purpose for which it was created. And the state has no interest in it whatever except to hold it as trustee for the purpose for which it was created.

In *Lankford v. Oklahoma Engraving & Printing Company*, 130 Pac., 278, cited by appellants, the court held that "the depositors of failed banks are entitled to be paid out of the depositors'

guaranty fund in preference to merchandise creditors of the failed bank." The court in its opinion said:

"The depositors' guaranty fund was created for the payment of depositors only as defined in *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, *supra*."

The court also held that the state should have for the benefit of the depositors' guaranty fund, a first lien upon all the assets of failed banks, etc., for money advanced to pay depositors.

The case of *Columbia Bank & Trust Co. v. U. S. F. & G. Co.*, 126 Pac., 556, is a very instructive case as to the nature and character of the depositors' guaranty fund.

The court held, in effect, that special protection must be required by law of a depositor when depositing state funds in banks and where the depositors did not come under the protection of the depositors' guaranty fund; that the depositors' guaranty fund is for the protection of depositors of failed banks, and can be used for that purpose only.

The general principle forming the basis of all issues to be decided, is that the depositors' guaranty fund is a specific state fund, created for a specific purpose, namely, the payment of depositors of failed banks, and that such fund can be used for no other purpose whatever, and must be used for that purpose. Neither the State of Oklahoma, the state banking board, nor any other person whomsoever has any beneficial interest in, or power to, dispose of the depositors' guaranty fund, or power to use it for any other purpose.

ARGUMENT UNDER POINT SIX.

(a) The complainant alleged in the first count in the petition that, "On the 8th day of June, 1912, E. J. Merkle & Company,

of Kansas City, Missouri, deposited in said Farmers & Merchants Bank, the sum of \$3900.00, and said Farmers & Merchants Bank on said date issued and delivered to said E. J. Merkle & Company a certificate of deposit, evidencing said deposit," etc.

"That said sum of \$3900.00 evidenced by said certificate of deposit continued in and remained on deposit in said bank, from said date until the failure of said bank." (See pages 2 and 3 of the printed record.)

The same averments appear in the second count of complainant's petition. (See pages 6 and 7 of the printed record.)

The evidence at the trial proved and the court in its decree found these allegations to be true, namely, that the money was actually deposited in the bank, and that it remained in the bank on deposit until the bank failed.

The certificates of deposit issued by the bank, and received by the depositor were merely evidence of the deposit. It would have made no difference to the depositor whether that evidence was put in the form of a certificate of deposit, or was evidenced by an entry in a pass book, or by any other written evidence, acknowledging its receipt by the bank.

Had the officers of the bank issued spurious certificates of deposit and negotiated and sold such certificates of deposit to other parties, a question *might* have been raised as to whether the money was actually deposited in the bank; but no such issue is or can be presented here. There was no loan made to the bank. There was no selling or negotiating of spurious certificates of deposit. The money was actually deposited in the bank by the depositor, in the usual course of business, and it remained in the bank on deposit until the bank failed.

The evidence demonstrated this beyond cavil or question. The state banking board paid the city treasurer of the City of Sapulpa the deposit due him, based upon exactly the same pass book and the same evidence presented by the complainant. No reason or ex-

cuse has been or can be offered for denying complainant's right to have his deposit paid out of the depositors' guaranty fund, as was admitted by the state bank commissioner in his testimony at the trial.

(b) Tiffany on Banks and Banking says:

"Ordinarily a depositor receives from the bank no evidence of his deposit, except the entry of the amount on his pass book. In such case the bank undertakes to honor his checks or other orders to the extent of his deposit. Sometimes, however, when a checking account as to a deposit is not contemplated, the bank issues a certificate of deposit. A deposit so made has the character of a general deposit, insofar as it creates simply the relation of debtor and creditor between the bank and the depositor."

In *Williams v. Rogers*, 77 Ky., 776, the purchaser of the assets of a bank assumed to pay all claims of "depositors" against the bank. In a proceeding to enforce payment of interest-bearing time deposits, the court holds:

"Whenever a deposit is made in bank, the relation of debtor and creditor is established between the bank and the depositor, and that relation is the same whether it is an ordinary or time deposit. All deposits are loans."

In the opinion, pages 787-8, the court says:

"It is further insisted that the terms of the contract between the Savings Institution and Hutchinson & Co. do not embrace the claims of appellee. That contract provides for the payment in terms of 'depositors.' Counsel present the question whether the expression is broad enough to include a 'loan,' such as the proof in this case establishes. We understand that all deposits are loans. Whenever a deposit is made in bank, the relations of debtor and creditor is established be-

tween the bank and the depositor. The identity of the particular money deposited is lost, and the relation between the parties continues the same whether it is an ordinary or a time deposit."

This is the precise question in the case at bar. All deposits are loans. Money actually deposited in bank is a "deposit" whether ordinary or time deposit. Whether a certificate of deposit can be impeached and proof made that, notwithstanding it, that the money was not in fact actually deposited in the bank, is not now before the court. For in this case the proof is conclusive *aliunde* the certificate of deposit, that the money was actually deposited in the bank. We contend that when it is proven beyond doubt the money was actually deposited in the bank in the usual course of business as a deposit, it becomes in law a "deposit."

The Constitution of South Carolina, Art. 9, Sec. 18, provides:

"The stockholders of an insolvent corporation will be individually liable to the creditors thereof only to the extent of the amount remaining due to the corporation, upon the stock owned by them. Provided, that the stockholders in banks or banking institutions shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same."

The case of *Wilks & Co. v. Arthur*, 74 S. E., 361, is a suit by the *holder of a time certificate of deposit* to enforce liability against the stockholders of a bank. In that case the Supreme Court of South Carolina said:

"The framers of the Constitution did not contemplate fine-spun distinctions between those depositing money in the bank, subject to draft, and those receiving time certificates for their deposits; nor the characteristics of a certificate of deposit and those of a promissory note. It makes no difference how much similarity there may be between a time certificate of

deposit and a promissory note, it does not prevent the person receiving the certificate of deposit from still occupying the relation of a depositor. No authority has been cited, and we believe none can be found, sustaining the proposition that a party depositing money in a bank in the usual course of business and accepting a time certificate, is not to be regarded as a depositor."

In *Lamar v. Taylor*, 80 S. E., 1085, the charter of a state bank provides:

"And said stockholders shall be further and additionally individually liable equally and ratably, and not one for another, as sureties to depositors of said corporation for all moneys deposited therein, in an amount equal to the face value of their respective shares of stock."

This was a proceeding to enforce liability against the stockholders of a failed bank, under this provision of the charter, in favor of the holders of certificates of deposit.

The Supreme Court of Georgia said:

"It was further contended that, in arriving at the amount for which suit was directed to be brought against each stockholder, in proportion to the number of shares of his stock, the presiding judge included the claims of holders of certificates of deposit, as well as those of ordinary deposits subject to check. The argument was that certificates of deposit were in the nature of promissory notes, and that holders of them were really creditors of the bank, rather than depositors, within the meaning of the charter. The language of the charter refers in general terms to depositors. It does not confine the liability of stockholders to the payment of depositors whose claims might be evidenced by entries in pass books, or exclude those whose claims might be evidenced by certificates. Certificates of deposit are not always uniform in their provision, and the special terms contained in them may to some extent vary their effect. The contention with which we are dealing does not depend upon the terms of any particular form of certificate, but on the theory that certificate holders generally are not depositors within the meaning of the charter. It is true that hold-

ers of certificates of deposit are creditors of a bank and that certificates of a certain form have been declared to be in effect promissory notes. *Lynch v. Goldsmith*, 64 Ga., 42. But a general deposit also creates the relation of debtor and creditor between the bank and the depositor. It is not contemplated that the actual money deposited will be held by the bank, but that it will be used, and other money will be paid when called for by the check of the depositor. *Ricks v. Broyles*, 78 Ga., 610 (4), 3 S. E., 772, 6 Am. St. Rep., 280. Thus, whether a general deposit be evidenced by an entry in a pass book or by a deposit slip, or by a certificate, the legal relation between the parties is that of debtor and creditor. The expression "certificate of deposit" in itself imports that it is based upon a deposit and the issuance of such a certificate does not exclude the holder from falling within the general descriptive word 'depositor,' for whose benefit the additional liability was created by the charter."

These authorities hold clearly that when one deposits money in a bank, and accepts a certificate of deposit therefor, he is a *depositor*" within the meaning of the constitutional, statutory and charter provisions, protecting general depositors, and the legislature of Oklahoma in enacting the statute in question when it used the term "depositors," must be held to have intended by the use of that term to adopt the construction given by the supreme courts of other states, who had theretofore construed similar laws.

All of which is respectfully submitted,

CHAS. A. LOOMIS,
Solicitor for Appellee.

INDEX OF SUBJECTS.

	Page
Statement of Facts	1-4
Points and Authorities	5-8
Argument under Point One	9-27
Argument under Point Two	27-46
Review of Authorities cited by Appellants	36
Argument under Point Three	46-48
Argument under Point Four	48-54
Review of Authorities cited by Appellants	54-56
Argument under Point Six	56-60
The action is not against the State of Oklahoma	41
The action is not an original proceeding for mandamus and U. S. Court has jurisdiction	9-27
The Depositors' Guaranty Fund is not a general state fund	48-54
Statute creating the depositors' guaranty fund and defining its use	48-49
The holder of a certificate of deposit is a "depositor" with- in the meaning of the bank guaranty law	56-60
<i>Aylesworth v. Gratiott</i> , 43 Fed., 350.....	pages 6, 17, 21
<i>Bacon v. Walker</i> , 204 U. S., 311, 315, 51 L. Ed., 499.....	51
<i>Burden v. Land & River Imp. Co.</i> , 157 U. S., 327, 330 (39:719)	47
<i>Burnham v. Field</i> , 157 Fed., 246	10
<i>Bath Co. v. Ames</i> , 14 Wall., 224	14-22
<i>Bono v. Phillips Co.</i> , 4 Dill., 216	18
<i>Bank v. Lansing</i> , 25 Mich., 207	18
<i>Blair v. Cuming</i> , 111 U. S., 363, 4 Sup. Ct. Rep., 449	19
<i>Bronson v. Rodes</i> , 7 Wall., 229	24
<i>Breckenridge Co. v. McCracken</i> , 22 U. S. App., 115, 9 C. C. A., 442, 61 Fed., 191	24
<i>Board of Liquidation v. McComb</i> , 92 U. S., 531, 23 L. Ed., 623	44
<i>Cates v. Alton</i> , 149 U. S., 45 (37:801)	48
<i>Cass Co. v. Johnston</i> , 95 U. S., 360, 248 L. Ed., 416, pages	5-16, 19-24
<i>Chicot County v. Sherwood</i> , 148 U. S., 529 (37:546)	48
<i>Coxington, etc., Bridge Co. v. Hager</i> , 203 U. S., 109, 518 L. Ed., 112	11
<i>Clark v. Nash</i> , 198 U. S., 361, 48 L. Ed., 1085	51
<i>County of Greene v. Daniel</i> , 102 U. S., 187	22
<i>Cunningham v. M. & B. Ry. Co.</i> , 109 U. S., 446, 27 L. Ed., 992	45
<i>Columbia Bank & Trust Co.</i> , 330 Okla., 535, 126 Pac., 556	56
<i>Cowley v. Nor. Pac. Ry. Co.</i> , 159 U. S., 569, 583 (40:- 263, 267)	48

INDEX—CONTINUED.

	Page
<i>Coteles v. Mercer Co.</i> , 74 U. S., 7 Wall., 118 (19:86)	48
<i>Davis v. Gray</i> , 83, U. S., 16 Wall., 203, 221 (21:447-453)	48
<i>Davenport v. Dodge Co.</i> , 105 U. S., 237, 26 L. Ed., 1018, pages	5-19, 22-25
<i>Denton v. Baker</i> , 79 Fed., 189	10
<i>Decatur v. Paudding</i> , 14 Pet., 497, 10 L. Ed., 559	36
<i>Danby Bank v. State Treas.</i> , 39 Vt., 92, pages 7, 51-52	14
Dillon on Municipal Law, Sec. 685	6, 36
<i>Ex parte. Young</i> , 209 U. S., 123, 52 L. Ed., 714	pages 6, 20, 27
<i>Fuller v. Aylesworth</i> , 75 Fed., 694	10
<i>Gates v. N. W. Nat'l Bldg. Association</i> , 55 Fed., 209	18
<i>Goodrich v. Detroit</i> , 12 Mich., 279	22-34
<i>Graham v. Norton</i> , 15 Wall., 427	6, 34
<i>Graham v. Folsom</i> , 200 U. S., 248, 50 L. Ed., 464	38
<i>Gov. of Ga. v. Madrazo</i> , 1 Pet., 110, 7 L. Ed., 73	pages 6, 25, 27
<i>Heidekoper v. Hadley</i> , 177 Fed., 1	35
<i>Hagood v. Southern</i> , 117 U. S., 52	
<i>Hans v. Louisiana</i> , 134 U. S., 1	
<i>Hopkins v. Clemson Agricultural College</i> , 117 U. S., 52	
<i>Holland v. Challen</i> , 110 U. S., 15, 24 (28:52-56)	47
<i>In re Forsythe</i> , 70 Fed., 301	10
<i>Jabine v. Oats</i> , 115 Fed., 861	9, 20
<i>Jordan v. Cass Co.</i> , 3 Dill., 185 pages 5-12, 18-19, 20-23	47
<i>Kieley v. McGlynn</i> , 88 U. S., 21 (22:599)	
<i>Knapp v. Lake Shore & Mich. Ry. Co.</i> , 197 U. S., 540, 49 L. Ed., 870	9
<i>Large v. Consolidated Nat'l Bank</i> , 137 Fed., 168	9
<i>Lave v. Trustee</i> , 4 Denio, 520	17
<i>Louisiana v. Jumel</i> , 107 U. S., 711, 2 Sup. Ct. Rep., 128 27 L. Ed., 448 pages 32-33-35, 41-43-4.	pages 6-32-55
<i>Lankford v. Okla. Eng. & Ptg. Co.</i> , 130 Pac., 278,	
<i>Love v. Filtsch</i> , 33 Okla., 121, 124 Pac., 30	8-59
<i>Lamar v Taylor</i> , 80 S. E., 1085	60
<i>Lynch v. Goldsmith</i> , 64 Ga., 42	48
<i>Lincoln County v. Luning</i> , 133 U. S., 529 (33:766)	48
<i>McConihay v. Wright</i> , 121 U. S., 201, 205 (30:932, 933)	
<i>Murray v. Wilson Distilling Co.</i> , 213 U. S., 150, 55 L. Ed., 742	45
<i>Mississippi Mills v. Cohn</i> , 150 U. S., 202, 204 (37:1052-1053)	48
<i>Noble State Bank v. Haskell</i> , 219 U. S., 104, 55 L. Ed. 112	51
<i>Affield v. N. Y., N. H. & H. R. Co.</i> , 203 U. S., 51 L. Ed., 1231	51
<i>Ogden v. Co. of Daviess</i> , 102 U. S., 634	18

INDEX—CONTINUED.

	Page
<i>Okla., A. & M. College v. Wills</i> , 6 Okla., 593, 52 Pac., 92	48
<i>Payne v. Hook</i> , 74 U. S., 7 Wall., 425, 470 (19:260, 262)	23-24
<i>Peck v. Jenness</i> , 7 How., 623	35, 41, 43
<i>Pennoyer v. McConnaughy</i> , 140 U. S., 1, 35 L. Ed., 363, pages	10
<i>Pensacola v. Lahmann</i> , 57 Fed., 324	48
<i>Reagan v. Farmers L. & T. Co.</i> , 154 U. S., 362, 391 (38:-1014, 1021)	47
<i>Rich v. Braxton</i> , 158 U. S., 375, 405 (39:1022, 1032)	60
<i>Ricks v. Broyles</i> , 78 Ga., 610, 3 S. E. Rep., 772, 6 Am. St. Rep., 280	43
<i>Rolston v. Crittenden</i> , 120 U. S., 390, 30 L. Ed., 720	22
<i>Rosenbaum v. Bauer</i> , 120 U. S., 480, 7 Sup. Ct. Rep., 633	22
<i>Riggs v. Johnson Co.</i> , 6 Wall., 166	33-35
<i>Ralston v. Mo. Fund Comm'rs</i> , 120 U. S., 390, 30 L. Ed., 721	35, 41-42
<i>Raymond v. Chicago Traction Co.</i> , 207 U. S., 20, 52 L. Ed., 78	35
<i>Re Ayers</i> , 123 U. S., 443, 42	48
<i>Re Tyler</i> , 149 U. S., 164, 190 (37:689-698)	35
<i>Scott v. Neely</i> , 140 U. S., 106 (35:358)	35
<i>Scott v. Donald</i> , 165 U. S., 58, 68 (41:632, 633)	46
<i>Smith v. Ames</i> , 169 U. S., 518, 42 L. Ed., 819	39
<i>State of Ind. v. Lake Erie Ry. Co.</i> , 85 Fed., 3	45-46
<i>Smith v. Reeves</i> , 178 U. S., 436, 44 L. Ed., 1140	9
<i>State ex rel. Hay v. Farnum</i> , 75 S. C., 165, 53 S. E., 83	7, 48-49
<i>State ex rel. Knapp v. Lake Shore & Mich. Ry Co.</i> , 197 U. S., 540	54-55
<i>Session Laws of Oklahoma</i> , 1911, Sec. 6, Chap. 31	58
<i>Session Laws of Oklahoma</i> , 1913, Sec. 6, Chap. 22	51
<i>State v. Cochrell</i> , 27 Okla., 630, 112 Pac., 1000, pages 6, 32	6, 36
<i>South Carolina Con.</i> , Art. 9, Sec. 18	8-58
<i>Strickley v. Highland Bay Gold Min. Co.</i> , 200 U. S., 527, 50 L. Ed., 581	35-39
<i>Taylor v. Louisville, etc., Ry. Co.</i> , 88 Fed., 350, 31 C. C. A., 537	14
<i>Tiffany on Banking</i>	46
<i>Tindall v. Wesley</i> , 167 U. S., 204, 220 (42:137-142)	8-58
<i>United States v. U. P. Ry. Co.</i> , 2 Dill., 527	8, 58
<i>Vance v. Vandercook</i> , 170 U. S., 438, 42 L. Ed., 1100	
<i>Wilkes v. Arthur</i> , 74 S. E., 361	
<i>Williams v. Rogers</i> , 77 Ky., 776	

15
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

J. D. LANKFORD, JOHN J. GERLACH, W. F.
BARBER and A. D. KENNEDY, Composing
the State Banking Board of the State of Okla-
homa,

v.

Appellants,

No. 381

PLATTE IRON WORKS COMPANY, a Corpora-
tion,

Appellee.

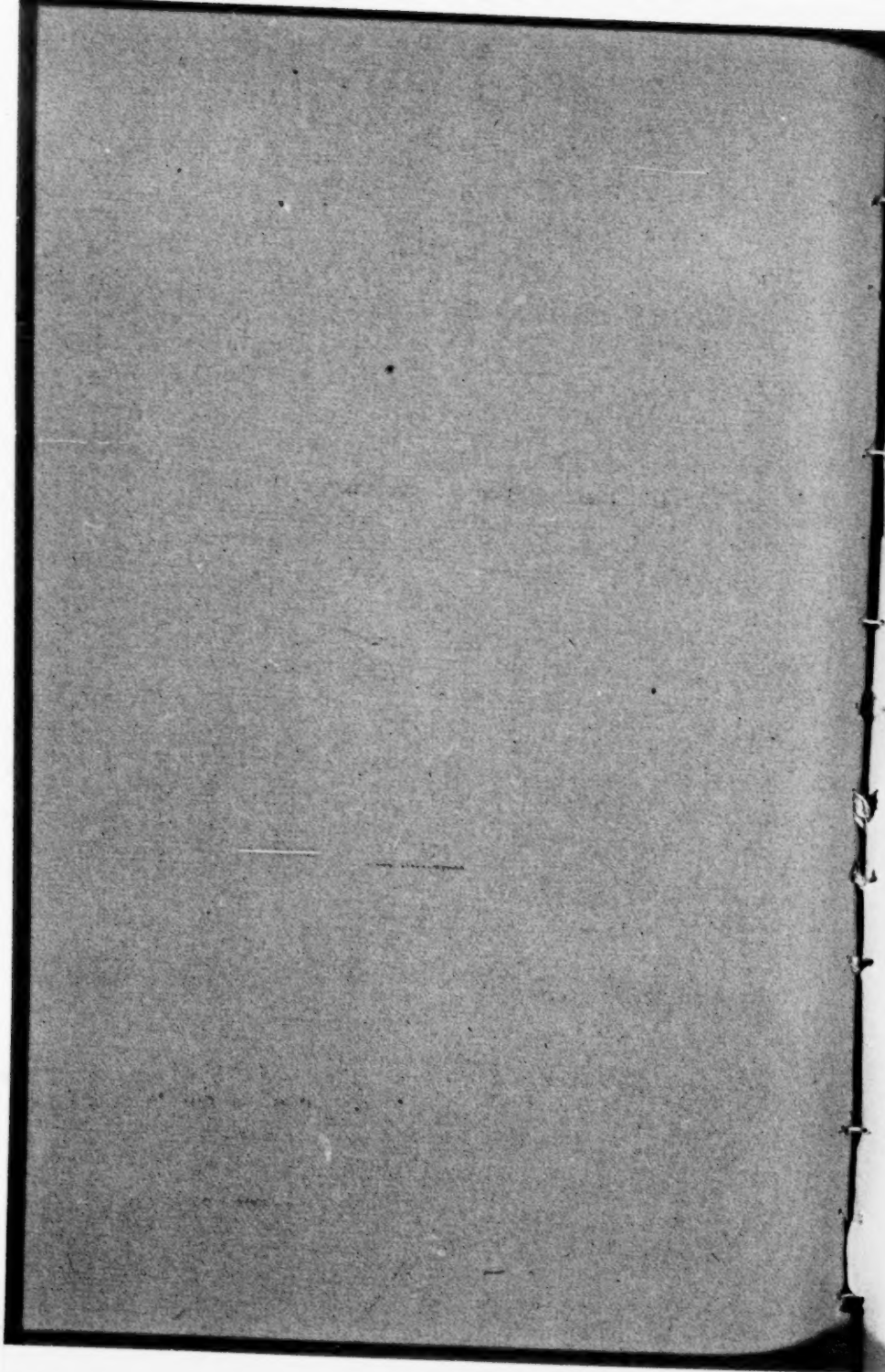
APPEAL FROM UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF OKLAHOMA

Supplemental Brief on Behalf of Appellee.

CHAS. A. LOOMIS,

Solicitor for Appellee.

John C. Howard, Printer, 712 Baltimore Ave., Kansas City, Mo.



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Supplemental Brief on Behalf of Appellee.

Point One.

The Federal Courts have an independent jurisdiction in the administration of the state laws in cases between citizens of different states, co-ordinate with and not subordinate to that of the state courts and are bound to exercise their own judgment as to the meaning and effect of those laws.

- Burgess v. Seligman*, 107 U. S., 20 and 30; 27 L. Ed., 359, l. c. 365;
Bucher v. Cheshire R. Co., 125 U. S., 555; 31 L. Ed., 795;
Julian v. Central Trust Co., 193 U. S., 93; 48 L. Ed., 629;
Stanley Co. Comm'rs v. Coler, 190 U. S., 437; 47 L. Ed., 1126;
Kuhn v. Fairmount Coal Co., 215 U. S., 349-360; 54 L. Ed., 228, 334-5 and cases cited;
Oats v. First National Bank, 100 U. S., 239; 25 L. Ed., 580;
Pana v. Bowler, 107 U. S., 529; 27 L. Ed., 424.

Point Two.

Since the decision in *Swift v. Tyson*, 16 Pet., 1-19; 10 L. Ed., 865, 871 it has been the accepted doctrine of this court that in respect to the doctrine of commercial law and general jurisprudence the courts of the United States will exercise their own independent judgment. And in respect to such judgment will not be controlled by decisions based upon local statutes or local usage, although if the question is balanced with doubt, the United States Court, for the sake of harmony, "will lean to an agreement of views with the state courts."

- Swift v. Tyson*, 16 Pet., 1-19; 10 L. Ed., 865, 871;
Presidio Co. v. Noel-Young Bond & S. Co., 212 U. S., 58; 53 L. Ed., 402 and cases cited;
Burgess v. Seligman, 107 U. S., 20-30; 27 L. Ed., 359, l. c. 365.

Point Three.

When the law of a state has not been settled it is not only the right but the duty of the Federal Court to exercise its own judgment in construing state statutes, as it also always does when the case before it depends on the doctrine of commercial law and general jurisprudence.

Kuhn v. Fairmount Coal Co., 215 U. S., 349, 360; 54 L. Ed., 228, 234-5;

Swift v. Tyson, 16 Pet., 1-19; 10 L. Ed., 865, 871.

Point Four.

As the very object in giving the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states, was to institute an independent tribunal which would not be supposed to be affected by local prejudice or sectional views it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.

Burgess v. Seligman, 107 U. S., 20-30; 27 L. Ed., 359, l. c. 365;

Julian v. Central Trust Co., 193 U. S., 93; 48 L. Ed., 629;

Stanley Co. Comm'rs v. Coler, 190 U. S., 437; 47 L. Ed., Ed., 1126;

Kuhn v. Fairmount Coal Co., 215 U. S., 349-360; 54 L. Ed., 228, 334-5;

Presidio Co. v. Noel-Young Bond & S. Co., 212 U. S., 58; 53 L. Ed., 402 and cases cited.

Respectfully submitted,

CHAS. A. LOOMIS,

Solicitor for Appellee.

235 U. S.

Argument for Appellants.

LANKFORD AND OTHERS, COMPOSING THE
STATE BANKING BOARD OF THE STATE OF
OKLAHOMA, v. PLATTE IRON WORKS COM-
PANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 381. Argued October 14, 15, 1914.—Decided January 5, 1915.

The decision of state tribunals in regard thereto is an important element to be considered in determining the interest which the State has in a fund administered by a state board.

The state courts of Oklahoma having held that the statute creating the State Banking Board intended to give the State a definite title to the Depositors' Guaranty Fund, the fact that the fund is to be used to satisfy claims of beneficiaries does not take its administration from the officers of the State or subject them to judicial control. This court will not assume that the fund will not be faithfully managed and applied. *Murray v. Wilson Distilling Co.*, 213 U. S. 151.

A suit by a depositor in a bank in Oklahoma against members of the State Banking Board and the Bank Commissioner of Oklahoma to compel payments from, distribution of, and assessments for, the Depositors' Guaranty Fund, is a suit against the State, and, under the Eleventh Amendment, cannot be maintained in the Federal court.

THE facts, which involve the application of the Eleventh Amendment to suits brought in the Federal courts against the members of the State Banking Board of Oklahoma to compel payments from, and distribution of, the Depositors' Guaranty Fund of that State, are stated in the opinion.

Mr. Charles West, Attorney General of the State of Oklahoma, for appellants:

The action is against the State of Oklahoma. Defendants are sued in their official capacity. The relief sought is such as could only be granted against them as officials of the State. They have no personal interest in the litigation.

tion. Were they not officers of the State they could not in any way comply with the decree rendered. The bill seeks payment of the plaintiff's claim out of the Depositors' Guaranty Fund or if the cash available be insufficient to issue Depositors' Guaranty Fund Warrants in payment of same.

The Supreme Court of Oklahoma held, that the Depositors' Guaranty Fund is a fund of the State, and that the State had a first lien on the failed bank's assets to discharge whatever the State should advance for it. *State v. Cockrell*, 27 Oklahoma, 630; *Lankford v. Oklahoma Engraving Co.*, 130 Pac. Rep. 278.

The object of the law is to serve public not private rights. Whether or not the Oklahoma Act served a private or a public purpose was the basis of the decision of this court in *Noble State Bank v. Haskell*, 219 U. S. 104; S. C., 219 U. S. 575.

The essence of the law is not to establish a private right but to conserve public welfare; and, as such, no justiciable rights in the depositors are to be presumed to arise; the law was not primarily enacted to return to the depositor his money, but more properly to prevent the public injury by bank panics. Nowhere is there language used showing an intent to give to a depositor the right to sue. See § 1, ch. 22, Sess. Laws, 1913; § 6, ch. 22, Sess. Laws, 1913.

With the exercise of a high executive discretion, the courts will not interfere. *Decatur v. Paulding*, 14 Pet. 497.

An action to compel state officers to pay a claim from a state fund in their charge, which they, in the exercise of an executive discretion, refused to pay, is an action against the State. *Governor of Georgia v. Madrazo*, 1 Pet. 110, 123; *Smith v. Reeves*, 178 U. S. 436.

An action to compel payment by the Treasurer of the State of a sum unlawfully collected as taxes is one to compel the State to pay out money from its funds and

235 U. S.

Counsel for Appellee.

therefore one against the State. See *Re Ayers*, 123 U. S. 443; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10; *Louisiana v. Jumel*, 107 U. S. 711; *Cunningham v. Macon & Brunswick Ry.*, 109 U. S. 446.

Murray v. Wilson Distilling Co., 213 U. S. 150, is conclusive of the issue here. The State has placed the management of a state fund in the hands of a board of state officers; and, as in that case, the purpose of the fund is to pay certain claimants; the State has selected that board, and no other tribunal to determine what claims shall be paid. The courts have no jurisdiction.

The case is not one in which it is sought to move the officer through the State but on the contrary the State is sought to be moved through its officers. Of this, the court has no jurisdiction, as it is in violation of the Eleventh Amendment.

The action is for mandamus, not ancillary to a prior judgment. *Farmers Nat. Bank v. Jones*, 105 Fed. Rep. 459. Not being ancillary to any judgment previously obtained, the Federal District Court had no jurisdiction thereof. *Covington &c. Bridge Co. v. Hager*, 203 U. S. 109; *Knapp v. Lake Shore Ry.*, 197 U. S. 540; *Fuller v. Aylesworth*, 75 Fed. Rep. 694. See also *Jabine v. Oats*, 115 Fed. Rep. 861; *Wiemer v. Louisville Water Co.*, 130 Fed. Rep. 246; *Large v. Consul*, 137 Fed. Rep. 168; *Pensacola v. Lehman*, 57 Fed. Rep. 324; *Denton v. Barber*, 79 Fed. Rep. 189; *Burnham v. Fields*, 157 Fed. Rep. 248; *Gares v. Northwest Bldg. Assn.*, 55 Fed. Rep. 210; *Indiana v. Lake Erie &c. Ry.*, 85 Fed. Rep. 3.

This rule applies to district courts as well as circuit courts. *In re Forsyth*, 78 Fed. Rep. 301.

The petition sets forth no cause of action.

Mr. Charles A. Loomis and *Mr. Allen McReynolds*, with whom *Mr. Howard Gray* and *Mr. John W. Halliburton*, were on the brief, for appellee:

A proceeding to obtain a judgment against officials in a representative capacity, payable out of a specific fund in their charge and control, is a proceeding to obtain a judgment for money not otherwise secured, within the meaning of the Federal Judiciary Act and confers jurisdiction upon the United States court. And this is true although it may be necessary to resort to mandamus to enforce collection of the judgment when obtained. *Jordan v. Cass Co.*, 3 Dill. 185; *Cass Co. v. Johnston*, 95 U. S. 360; *Davenport v. Dodge Co.*, 105 U. S. 237; and see also *Aylesworth v. Gratiott*, 43 Fed. Rep. 340; *S. C.*, aff'd, 159 U. S. 40; *Fuller v. Aylesworth*, 75 Fed. Rep. 694; *Heidekoper v. Hadley*, 177 Fed. Rep. 1.

This is not a suit against the State. An action against a state officer to compel him to perform duties prescribed by law, is not an action against the State. An officer who refuses to obey the law does not stand for the State, within the meaning of the Federal Constitution.

A sovereign State must be presumed to be willing that its laws shall be obeyed. Through its laws it speaks to its servants, and commands them to do something. This suit therefore, instead of being against the State, is against its servants to compel the performance of duties, which by their acceptance of the office, they obligated themselves to perform. *Heidekoper v. Hadley*, 177 Fed. Rep. 1; *Lankford v. Oklahoma Engraving Co.*, 130 Pac. Rep. 278; *State v. Cockrell*, 27 Oklahoma, 630; *Ralston v. Missouri Fund*, 120 U. S. 390; *Graham v. Folsom*, 200 U. S. 248; *Taylor v. Louisville &c. R. Co.*, 88 Fed. Rep. 350; *Smith v. Ames*, 169 U. S. 518; *Ex Parte Young*, 209 U. S. 123.

The fact that the complainant may have a remedy in an original proceeding in mandamus in the state court for the cause of action alleged, will not deprive the complainant of the right to sue in equity in the Federal court. *Smith v. Ames*, 169 U. S. 518.

The Oklahoma depositors' guaranty fund is not a part

235 U. S.

Argument for Appellee.

of the general state funds and is not under the control of, and cannot be used by, the executive or legislative branches of the state government for general state purposes, or for any purpose whatever. The fund is in the possession and control of the State Banking Board, and can be used solely for the purpose of paying depositors of failed banks. *Danby v. State Treasurer*, 39 Vermont, 92; Sess. Laws, Oklahoma, 1911, ch. 31, § 6; *Id.*, 1913, ch. 22, § 6.

Depositors in failed banks have a justiciable right to enforce payment out of the depositors' guaranty fund. *Danby v. State Treasurer*, 39 Vermont, 92.

This is not a suit on a certificate of deposit, as a negotiable instrument, but is a suit for money actually deposited. The fact that a certificate of deposit was accepted as evidence of the deposit, will not deprive the depositor of the right to be paid out of the depositors' guaranty fund.

The holder of a time certificate of deposit is a "depositor" within the meaning of the State Bank Guaranty Law of Oklahoma. *Tiffany on Banks*, 75; *Williams v. Rogers*, 77 Kentucky, 776; *Wilkes & Co. v. Arthur*, 74 S. E. Rep. 361; *Lamar v. Taylor*, 80 S. E. Rep. 1085.

The Federal courts have an independent jurisdiction in the administration of the state laws in cases between citizens of different States, coördinate with and not subordinate to that of the state courts and are bound to exercise their own judgment as to the meaning and effect of those laws.

As the object in giving the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute an independent tribunal which would not be supposed to be affected by local prejudice or sectional views it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.

Burgess v. Seligman, 107 U. S. 20, 30; *Bucher v. Cheshire R. Co.*, 125 U. S. 555; *Julian v. Central Trust Co.*, 193 U. S. 93; *Stanley Co. v. Coler*, 190 U. S. 437; *Kuhn v. Fairmount Coal Co.*, 215 U. S. 349, 360; *Oats v. First National Bank*, 100 U. S. 239; *Pana v. Bowler*, 107 U. S. 529.

In respect to the doctrine of commercial law and general jurisprudence the courts of the United States will exercise their own independent judgment. In respect to such judgment they will not be controlled by decisions based upon local statutes or local usage, although if the question is balanced with doubt, the United States court, for the sake of harmony, "will lean to an agreement of views with the state courts." *Swift v. Tyson*, 16 Pet. 1, 19; *Presidio Co. v. Noel-Young Co.*, 212 U. S. 58; *Burgess v. Seligman*, 107 U. S. 20, 30.

When the law of a State has not been settled it is not only the right but the duty of the Federal court to exercise its own judgment in construing state statutes, as it also always does when the case before it depends on the doctrine of commercial law and general jurisprudence. *Kuhn v. Fairmount Coal Co.*, 215 U. S. 349, 360; *Swift v. Tyson*, 16 Pet. 1, 19.

This action is not an action against the State. The defendants cannot seek shelter behind the State for the abuse of their discretion in office. See § 55, Art. 5, Const. of Oklahoma, the purpose of which is to control the method in which public money or state funds should be disbursed. The word "appropriation" has a definite and certain meaning in law and is generally defined as the setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money and no more, for that object and no other. *State v. Moore*, 50 Nebraska, 88; *Ristine v. State*, 20 Indiana, 328; *Clayton v. Barry*, 27 Arkansas, 129; *Stratton v. Greene*, 45 California, 149; *State v. LaGrave*, 23 Nebraska, 25; *State*

235 U. S.

Argument for Appellee.

v. *Wallich*s, 12 Nebraska, 407; *Proll* v. *Dun*, 80 California, 220.

As applied to the general fund in the treasury of a State, "appropriation" is defined to be an authority from the legislature, given at the proper time and in legal form to the proper officer, to supply sums of money, out of that which may be in the treasury in a given year, for specific objects or demands against the State. *State* v. *Lindsley*, 3 Washington, 125; *State* v. *King*, 67 S. W. Rep. 812; *Ristine* v. *State*, 20 Indiana, 328; *Shatteck* v. *Kincaid*, 31 Oregon, 379.

Nothing in *Noble State Bank* v. *Haskell*, 219 U. S. 104, warrants the conclusion that the guarantee fund is one of the State. See § 7919.

Administrative or ministerial officers with duties prescribed by law for their performance may be compelled to perform those duties by those who may be directly interested in their performance. *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Rolston* v. *Missouri*, 120 U. S. 390; *Graham* v. *Folsom*, 200 U. S. 248; *Taylor* v. *Louis. & Nash. R. R.*, 88 Fed. Rep. 350; *Madison* v. *Smith*, 83 Indiana, 502; *Huidekoper* v. *Hadley*, 177 U. S. 1; *State Board* v. *People*, 191 Illinois, 528; *State* v. *Bourne*, 151 Mo. App. 104; *State* v. *Adcock*, 206 Missouri, 556.

The money in the guarantee fund is not subject to appropriation by the legislature for any purpose it may see fit. On the contrary it is collected from a special source for a limited purpose. The credit of the State is not loaned, simply the credit of this fund. *Ipso facto* it follows that this is not a suit against the State.

Under our system of laws there is no wrong without a remedy, and yet to deprive the appellee in this case of its money and deny it judicial relief with the barren statement that this action could not be maintained because against the State would certainly work a wrong, and no less certainly find appellee without a remedy.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit in equity brought by appellee against appellants, constituting the Oklahoma State Banking Board. The Platte Iron Works Company, appellee, is a Maine corporation and a citizen of that State and became the holder of two certain time certificates of deposit issued by the Farmers' & Merchants' Bank of Sapulpa. Appellants are members of the State Banking Board, and the appellant J. D. Lankford is the State Bank Commissioner.

On September 10, 1912, the Bank Commissioner took charge of the Farmers' & Merchants' Bank and of all its assets and proceeded to wind up its affairs. Demand for the payment of the certificates was made upon the Banking Board and the Commissioner out of the Depositors' Guaranty Fund of the State, but payment was refused.

A decree was prayed adjudging appellee owner of the deposits and certificates of deposit and that it was entitled to have the same paid out of the Depositors' Guaranty Fund created under and by virtue of the laws of the State. If there should be not sufficient funds available therefor, that the Banking Board be required to issue to appellee certificates of indebtedness for the amount of the deposit, to be known as "Depositors' Guaranty Fund Warrants of the State of Oklahoma" bearing 6% interest as provided by § 3, Article 2, Chapter 31, Session Laws of Oklahoma, 1911, as amended by Senate Bill No. 231, passed at the last session of the State Legislature, and that the Banking Board be required to levy an assessment against the capital stock of each and every bank and trust company organized and existing under the laws of Oklahoma for the purpose of increasing such Depositors' Guaranty Fund and pay the deposits and the "Depositors' Guaranty Fund Warrants of the State of Oklahoma." General relief was also prayed.

235 U. S.

Opinion of the Court.

Defendants in the suit, appellants here, moved to dismiss the bill on the ground that the court had no jurisdiction of the action or of the persons of the defendants, the suit being one against the State of Oklahoma without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States.

The motion was denied and defendants were given thirty days to answer. No answer appears in the record but the decree recites that one was filed. The court entered a decree as prayed for in the bill and this appeal was then prosecuted.

The assignments of error in this court are: (1) The suit is an original action in mandamus and the District Court had no jurisdiction, the same not being ancillary to any judgment theretofore obtained; (2) the suit is one against the State, "the defendants [appellants] having no personal interest therein and being sued in their official capacity as agents" of the State; (3) the amended bill upon its face states no cause of action for relief.

Is the suit one against the State? The appellee earnestly contends that the answer should be in the negative. "An action," counsel say, "against a State officer to compel him to perform duties prescribed by law is not an action against the State. An officer who refuses to obey the laws does not stand for the State, within the meaning of the Federal Constitution."

These contentions depend upon the meaning of the law; they assume its commands are disobeyed by the officers of the State; in other words, that the default of the officers is personal, in opposition—not in conformity—to the law of the State. But another and seemingly broader contention is made. It is asserted that the Depositors' Guaranty Fund is not under the executive and legislative control of the State and cannot be used by either for any purpose whatever, but "can be used solely for the purpose of paying depositors of failed banks." Two questions,

therefore, are presented, one of power and one of interpretation.

This court, in *Noble State Bank v. Haskell*, 219 U. S. 104, sustained the constitutionality of the act as an exercise of the police power of the State. The law in its general purpose was there presented and passed on. The relation of the State to the fund did not come up for consideration, but necessarily this is but a detail in administration not one affecting legality of the law. The creation of the fund was said to be justified by its purpose, and the power of the State was declared adequate to accomplish it. "The purpose of the fund," it was said, "is shown by its name. It is to secure the full repayment of deposits."

Where the State should vest the title to the fund for the purpose of its administration was immaterial to the essence of the power to create the fund. Whether the State should commit it to the mere ministerial administration of the Bank Commissioner and Banking Board and subject them to controversies with depositors or draw around them the circle of its immunity, was a matter within its competency to determine, and we are brought to the question of interpretation—which has the State done?

By the statute, the Banking Board is composed of the Bank Commissioner and three other persons, to be appointed by the Governor; and it is provided that the "Board shall have supervision and control of the Depositors' Guaranty Fund, and shall have power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of said fund." The fund is created by levying "against the capital stock of each and every bank organized and existing under the laws" of the "State an annual assessment equal to one-fifth of one per cent., and no more, of its average daily deposits during its continuance as a banking corporation," the fund to be "used solely for the pur-

235 U. S.

Opinion of the Court.

pose of liquidating deposits of failed banks and retiring warrants provided for" in the act. If at any time the fund be insufficient for such purpose or to pay "other indebtedness properly chargeable against the same, the Banking Board shall have authority to issue certificates of indebtedness to be known as 'Depositors' Guaranty Fund Warrants of the State of Oklahoma,' in order to liquidate the deposits" or such other indebtedness. It is provided that the depositors shall be paid in full, and when the cash available or that can be made immediately available is not sufficient to discharge the obligations of the bank or trust company "the Banking Board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in § 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

The contention of appellee is that the law has created a fund for the payment of depositors and directs that they shall be paid in full from the fund or "from additional assessments." If the fund be insufficient for such purpose, it is further contended, the Board is required to issue guaranty fund warrants in order to liquidate the deposits. Such, it is insisted, are the plain commands of the statute to which obedience is imposed and is necessary to fulfill the purpose of the law, which is to secure the full repayment to depositors. And, therefore, a suit by depositors is not a suit against the State but a suit to compel submission by the officers of the State to the laws of the State, accomplishing at once the policy of the law and its specific purpose.

There is strength in the contentions and we are not insensible to it, but there may be more complexity in fulfilling the scheme of the statute than the language of counsel exhibits and it may be embarrassed if not defeated by subjecting the Banking Board to incessant judicial inquiries of its administration. We certainly cannot assume that it will not do its duty and provide the ultimate payment of all depositors. To this result the State makes itself an active agent. It is given a lien upon the assets of insolvent banks and upon all liabilities against their stockholders, officers, directors, and against other persons, which may be enforced by the State for the benefit of the fund which its law has created.

In *Murray v. Wilson Distilling Co.*, 213 U. S. 151, there is analogy to the case at bar. The State of South Carolina in the year 1892 assumed the exclusive management of all traffic in liquor. It subsequently abandoned the scheme and passed an act called "the State Dispensary act" to provide for the disposition of all property of the instrumentality it had created and to wind up its affairs. A commission was appointed for that purpose. A part of the duties of the commission was to dispose of the property, collect all debts due and pay "from the proceeds thereof all just liabilities at the earliest date practicable." Any surplus was to be paid to the State Treasury. A duty, therefore, was imposed upon the commission to collect the assets of the dispensary and pay its debts and it was as directly expressed as was the duty imposed upon the Banking Board in the pending case.

The Wilson Distilling Company contended that the Winding-up Act of the State created a trust, and the funds in the hands of the commission were a trust fund held for the benefit of the creditors of the State dispensary and the suit a plain suit in equity brought by a *cestui que trust* to compel a trustee holding property for his benefit

235 U. S.

Opinion of the Court.

to perform the duties imposed upon him. The suit, therefore, it was contended, was not to require the commissioners to do that which the law of the State forbade, but to do what the law of the State commanded, and the State was not a necessary nor an indispensable party. The contentions received the approval of the Circuit Court of Appeals, but this court took a different view of them and decided that there was "no just ground for the conclusion that the State, in providing by that legislation for the liquidation of the affairs of the State dispensary, intended to divest itself of its right of property in the assets of that governmental agency, and to endow the commissioners with a right and title to the property which placed it so beyond the control of the State as to authorize a judicial tribunal to take the assets of the State out of the hands of those selected to manage the same, and by means of a receiver to administer such assets as property affected by a trust, irrevocable in its nature, and thus to dispose of the same without the presence of the State." (213 U. S., p. 170.) The case, it is true, has some differences from that at bar. There the State was the owner of the property committed to the commissioners for disposition and was also the original debtor. Here the property is that of the contributing banks and is accumulated in a fund for the security of their respective depositors. These are differences, but there are substantial resemblances. In that case officers were appointed to administer the property and liquidate and pay the demands against it, and this was the specific direction of the law, marking the beneficiaries and apparently making them the exclusive parties in any proceedings to enforce the law. In this case officers are appointed having even a greater power. They are not only empowered to liquidate the deposits or other indebtedness of failed banks, but to levy assessments on other banks to make up any deficiency. Therefore, as the

State was said to be a necessary party in the cited case, the State can be said to be a necessary party in the pending case because of its interest that the fund which it has caused to be created in pursuance of its policy shall be administered by the officers it has appointed rather than by judicial tribunals. Certainly this construction can be given to the Oklahoma statute; and, granting that it may admit of dispute, an important element to be considered is the decision of the state tribunals.

In *State v. Cockrell*, 112 Pac. Rep. 1000, the Supreme Court of Oklahoma had occasion to define the duties of State Examiner and Inspector. It decided that the office was constituted by the constitution of the State and was independent of the control of the Governor, and passing upon the authority of the Examiner and Inspector over the accounts of the Bank Commissioner it decided that "the funds and assets" of an insolvent bank are "under the management of the State" and "that the depositors' guaranty fund and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund is as much a fund of the State as the common school fund."

It was further decided that the act creating the fund was sustained as an exercise of the police power for the public welfare of the people of the State and, having been so exercised, the assessment levied by it upon deposits for the purpose of protecting the depositors of the banks is the exertion of the same power "which levies or causes to be levied, a tax upon the property within the State for the maintenance and support of the common schools and educational institutions." And it was said, "The title of such depositors' guaranty fund vests in the State just as much so as the common school lands or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the State for

235 U. S.

Opinion of the Court.

a specific purpose. Even if it were not a state fund, it would at least be a fund under the management of the State."

From this decision it appears that the law intended to give to the State as definite a title to the Depositors' Guaranty Fund as to the common school fund, as definite, therefore, as the title of South Carolina to the assets of the State dispensary, which was the subject of decision in *Murray v. Wilson Distilling Company*. In both cases there were ultimate beneficiaries—in the pending case, the bank depositors; in the other case, the creditors of the dispensary. And the purpose of the law—or, if you will, the command of the law—in each case was or is the satisfaction of the claims of those beneficiaries. The fund having this ultimate destination does not take its administration from the officers of the State or subject them to judicial control. We cannot assume that it will not be faithfully managed and applied.

In *Lovett et al., County Commissioners of Creek County, v. Lankford et al.*, composing the Banking Board of the State of Oklahoma, 145 Pac. Rep. 767, the Supreme Court of Oklahoma decided, citing the *Cockrell Case*, that the defendants in error in the case composing the Banking Board were "executive officers of the State, and in performing their duties in administering the law under consideration (the Guaranty Fund Act), do so as such officers, and the property entrusted to their control and management by the law is property owned by the State, or property in which the State has an interest," and that therefore a suit against them to compel their administration of the depositors' guaranty fund "is, in fact, a suit against the State; and in the absence of the consent of the State, the same cannot be maintained." The court further said that "the law has specifically confided to the Banking Board and the Bank Commissioner the duty and authority to determine the validity of claims against the depositors'

guaranty fund," and, also that "it is not only their duty to determine when a claim is valid against the bank, but they must further determine whether such claim is protected and required to be paid from the depositors' guaranty fund. *Lankford v. Oklahoma Engraving and Printing Co.*, 35 Oklahoma, 404." Any other view, the court in effect said, would not only substitute the judgment of a court for that of the officials, "but would harass and create confusion, the effect of which would destroy the efficiency of such board." That case and *Columbia Bank and Trust Company v. United States Fidelity and Guaranty Company*, 33 Oklahoma, 535, give special emphasis to the principle announced. Both were suits to recover deposits respectively of county and state moneys deposited as general or special deposits.

It will serve no purpose to review the cases cited by appellee in which state officers were enjoined from doing unlawful acts, prescribed, it may be, by unconstitutional laws, or commanded by valid laws to perform specific duties. Examples of such cases are reviewed and distinguished in *Murray v. Wilson*, and there is a later example in *Hopkins v. Clemson College*, 221 U. S. 636.

The foundation of appellees' argument is, as we have said, that the Oklahoma statute imposed the duty upon the Bank Commissioner of paying depositors of insolvent banks and that "this suit, therefore, instead of being against the State, is against its servants to compel the performance of duties, which, by their acceptance of the office, they obligated themselves to perform." A duty being prescribed, it is further contended, the officers "cannot seek shelter behind the State for the abuse of their discretion in office." But these contentions and the arguments based upon them all depend upon an incorrect version of the statute, as we have seen.

Decree reversed.

235 U. S. PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE DAY, MR. JUSTICE VAN DEVANTER and MR. JUSTICE LAMAR, dissenting.

The question upon which we are divided is whether this action, brought by a depositor in an insolvent state bank of Oklahoma, asserting the right to compel payment of his deposit by the State Banking Board out of the Depositors' Guaranty Fund, or, if this be insufficient, then by the issuance of a certificate of indebtedness of the kind known as Depositors' Guaranty Fund Warrants, is in effect a suit against the State, and therefore within the inhibition of the Eleventh Amendment to the Federal Constitution, or whether it is merely an action against state officers to compel the performance of duties of a non-political nature clearly prescribed by a statute of the State, so that the officers in refusing to obey that law do not represent the State. I agree that the question depends upon the true intent and meaning of the law, and that in determining it we are to assume that the commands of the law are disobeyed by the defendants-appellants; so much, indeed, having been adjudged, upon their confession, in the present case.

There is, I think, no controlling decision.

Murray v. Wilson Distilling Co., 213 U. S. 151, seems plainly distinguishable. That case dealt with transactions in which the State of South Carolina had a direct property interest and a direct responsibility as a contracting party; and it was upon this ground that the court held the action brought against the agents of the State was in effect a suit against the State. This will appear by a reference to the opinion, pp. 168, 170, etc. It will be my endeavor to show that, under the Oklahoma statute, there is no such interest or responsibility on the part of the State.

We are referred to certain cases in the state court of last resort, one of which, and a very recent one, bears

PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting. 235 U. S.

directly upon the question; and it is frankly conceded that proper deference should be paid to them. At the same time, it is not to be forgotten that this action was brought in the District Court of the United States because of the diverse citizenship of the parties,—a ground of jurisdiction especially provided for in the Constitution (Art. III, § 2). And, however desirable it may be to preserve harmony of decision between the Federal and the state courts, we cannot, with due regard to our duty, fail to exercise an independent judgment respecting the true intent and meaning of the statute, in the absence of an authoritative adjudication to the contrary *previous to the time that the cause of action arose*. For this plaintiff-appellee is entitled to the enforcement of its contract as it was made; and it invokes a Federal jurisdiction that was established for the very purpose of avoiding the influence of local opinion. *Burgess v. Seligman*, 107 U. S. 20, 33, 34; *East Alabama Ry. v. Doe*, 114 U. S. 340, 353; *Gibson v. Lyon*, 115 U. S. 439, 446; *Anderson v. Santa Anna*, 116 U. S. 356, 362; *B. & O. Railroad v. Baugh*, 149 U. S. 368, 372; *Folsom v. Ninety-six*, 159 U. S. 611, 625; *Stanly County v. Coler*, 190 U. S. 437, 444; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 357, 360.

The statute in question is the so-called Bank Depositors' Guaranty Fund Act of Oklahoma, first enacted December 17, 1907, and several times amended, but not in essential respects. The portions pertinent to the discussion, as they stood upon the statute-book when the present cause of action arose (in the year 1912) are set forth in the margin, followed by an amendment adopted in 1913, shortly before the action was commenced.¹

¹ Extracts from Bank Depositors' Guaranty Fund Act, as found in Revised Laws of Oklahoma, 1910 (Harris and Day), §§ 298, *et seq.*, and in subsequent Session Laws.

Section 3 (299 and 300, as amended by Laws 1911, p. 54), "There is hereby levied an assessment against the capital stock of each and every

235 U. S. PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting.

It seems to me clear that, by the language and evident meaning of this law, the State has no property interest in the guaranty fund. No part of it is raised through general taxation, nor can any part of it be lawfully placed in the treasury of the State, or devoted to any of the

bank and trust company organized or existing under the laws of this State, for the purpose of creating a Depositors' Guaranty Fund, equal to 5 per centum of its average daily deposits during its continuance in business as a banking corporation. Said assessment shall be payable one-fifth during the first year of existence of said bank or trust company, and one-twentieth during each year thereafter until the total amount of said 5 per centum assessment shall have been fully paid. . . . After the 5 per centum assessment, hereby levied, shall have been fully paid, no additional assessment shall be levied or collected against the capital stock of any bank or trust company, except emergency assessments, hereinafter provided for, to pay the depositors of failed banks, and except assessments that may be necessary by reason of increased deposits to maintain such funds at 5 per centum of the aggregate of all deposits in such banks and trust companies, doing business under the laws of this State. . . .

"Whenever the depositors' fund shall become impaired or be reduced below said 5 per centum by reason of payments to depositors of failed banks, the State Banking Board shall have the power and it shall be its duty to levy emergency assessments against capital stock of each bank and trust company doing business in this State to restore said impairment or reduction, but the aggregate of such emergency assessments shall not, in any one calendar year, exceed 2 per centum of the average daily deposits of all such banks and trust companies. If the amount realized from such emergency assessments shall be insufficient to pay off the depositors of all failed banks having valid claims against said Depositors' Guaranty Fund, the State Banking Board shall issue and deliver to each depositor, having such unpaid deposit, a certificate of indebtedness for his unpaid deposit, bearing 6 per centum interest. Such certificate shall be consecutively numbered, and shall be payable, upon the call of the State Banking Board, in like manner as state warrants are paid by the state treasurer in the order of their issue, out of the emergency levy thereafter made; and the State Banking Board shall from year to year levy emergency assessments, as hereinbefore provided, against the capital stock of all the banking corporations and trust companies doing business in this State, until such certificates of indebted-

PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting. 235 U. S.

ordinary purposes of the government, or to any purpose other than the payment of depositors. The State, it is true, through the Banking Commissioner, holds the bare legal title to the fund, and enforces in the name of the

ness, with the accrued interest thereon, shall have been fully paid. As rapidly as the assets of failed banks are liquidated and realized upon by the bank commissioner, the same shall be applied first, after the payment of the expenses of liquidation, to the repayment of the Depositors' Guaranty Fund of all money paid out of said fund to the depositors of such failed bank, and shall be applied by the State Banking Board toward refunding any emergency assessment levied by reason of the failure of such liquidated bank. Provided, that the guaranty fund collected under this act, shall be re-deposited with the banks from which it was paid and a special certificate, or certificates, of deposit shall be issued to the bank commissioner by each and every bank and trust company, bearing 4 per centum interest per annum."

By § 5 (302) in the event of the insolvency of any bank, the bank commissioner "may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers and directors."

Section 6 (303) "In the event that the bank commissioner shall take possession of any bank or trust company which is subject to the provisions of this chapter, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 300, the amount necessary to make up the deficiency; and the State shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank or trust company, and all liabilities against the stockholders, officers and directors of said bank or trust company and against all other persons, corporations or firms. Such liabilities may be enforced by the State for the benefit of the depositors' guaranty fund."

Section 8 (305) "The bank commissioner shall deliver to each bank or trust company that has complied with the provisions of this chapter a certificate stating that said bank or trust company has complied with the laws of this State for the protection of bank depositors, and that safety to its depositors is guaranteed by the depositors' guaranty fund of the State of Oklahoma. Such certificate shall be conspicuously dis-

235 U. S. PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting.

State the liabilities of the failed banks, but this is done for the sole benefit of the fund. Thus the State has title only, but without real ownership. Not even is the credit of the State pledged for the success of the scheme, for while § 8 permits banks to display an official certificate of compliance with the law, the certificate declares that safety to the depositors is guaranteed not by the State but by the depositors' guaranty fund, and it is made a misdemeanor for any bank officer to advertise the deposits as guaranteed by the State. It would, I think, be difficult to find language more clearly showing that the State is

played in its place of business, and said bank or trust company may print or engrave upon its stationery and advertising matter words to the effect that its depositors are protected by the depositors' guaranty fund of the State of Oklahoma: Provided, however, that no bank shall be permitted to advertise its deposits as guaranteed by the State of Oklahoma; and any bank or bank officers or employes who shall advertise their deposits as guaranteed by the State of Oklahoma shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail for thirty days or by both such fine and imprisonment."

By act of March 6, 1913 (Sess. Laws, ch. 22, pp. 27-29), the third section was amended so as to provide for the issuance of certificates of indebtedness to be known as "Depositor's Guaranty Fund Warrants of the State of Oklahoma" in order to liquidate the deposits of failed banks or other indebtedness properly chargeable against the fund; the warrants to bear six per cent. interest, and to constitute a charge and first lien upon the depositors' guaranty fund when collected, as well as a first lien against the capital stock, surplus, and undivided profits of every bank operating under the banking laws of the State to the extent of its liability to the fund; and that "All warrants heretofore issued by the Banking Board shall be paid serially in the order of their issuance from any funds on hand when this act takes effect or provided for by the terms of this act, and all warrants hereafter issued shall be in numerical order and retired in like order. As rapidly as the assets of failed banks are liquidated and realized upon by the Bank Commissioner, the proceeds thereof, after deducting the expenses of liquidation, shall be paid to the State Banking Board, and by said board credited to the Depositors' Guaranty Fund."

PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting. 235 U. S.

neither interested in the fund nor responsible to the depositors with respect to it. And when we read these and the other provisions of the act in the light of the state constitution, the matter becomes still more plain. For, by the constitution, Article 5, § 55, "No money shall ever be paid out of the treasury of this State, nor any of its funds, nor any of the funds under its management, except in pursuance of an appropriation by law, . . . and every such law . . . shall distinctly specify the sum appropriated and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum." It cannot, I think, be reasonably contended that the guaranty fund was intended to be a state fund, or a fund under the management of the State, within the meaning of the constitution. To so hold would render the Act violative of the section quoted, since its provisions are plainly inconsistent with the slow and formal process of legislative appropriations. Again, by Article 10, § 15, of the state constitution, "The credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association . . .; nor shall the State become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax or otherwise, to any company, association, or corporation." These constitutional limitations explain, I think, why in the framing of the Act the legislature was so careful to dissociate the State in its organized capacity from all participation in the scheme or responsibility for its success. The Act contemplates that the cash constituting the fund is to be in the physical custody of the banks themselves, until actually needed; for by § 3, as amended in 1911, it was provided that the fund should be re-deposited with the banks from which it was paid, and a special certificate or certificates of deposit issued to the bank commissioner by each bank, bearing four per centum interest per annum; and by the 1913 amendment the

235 U. S. PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting.

annual assessments for that and succeeding years are to be paid by cashier's checks, to be held by the Banking Board until in its judgment it is necessary to collect them, but the checks are not to bear interest during the time they are so held. In short, the Act, as I read it, simply establishes a plan for enforced coöperative insurance by all the banks in favor of the depositors of each and every bank, the Bank Commissioner and the Banking Board being charged with the management of it as public trustees, with duties owing to a limited class of persons having financial and not political interests.

The promise held out to bank depositors is clear and unequivocal. By §§ 5 and 6, in the event of the insolvency of any bank, the bank commissioner may take possession of its assets, and in this event "*the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company is not sufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section 300, the amount necessary to make up the deficiency.*" And by § 3 (300), if the amount realized from emergency assessments shall be insufficient to pay off the depositors, "*The state banking board shall issue and deliver to each depositor, having such unpaid deposit, a certificate of indebtedness for his unpaid deposit, bearing 6 per centum interest;*" these certificates to be consecutively numbered and to be paid in the order of their issue out of future emergency assessments which the Banking Board is required to levy annually until the certificates of indebtedness with accrued interest shall have been fully paid. By the 1913 amendment, the certificates of indebtedness are designated as "Depositors' Guaranty Fund Warrants," and are to constitute a charge upon the guaranty fund when collected as well as a lien against the capital stock, surplus, and

PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting. 235 U. S.

undivided profits of every bank to the extent of its liability to the fund.

The entire scheme is carefully devised to give assurance to every bank and to every bank depositor not merely of ultimate payment of the amount of the deposits, but of immediate payment in cash or in certificates salable for cash, in case the bank becomes insolvent. A winding up of the bank's affairs, with a liquidation of its assets and enforcement of the liabilities of stockholders, officers and directors, is provided for, and the proceeds are to be devoted to restoring the guaranty fund and repaying to the solvent banks the amount of the emergency assessments; but the depositors are not to await the outcome of the process. A main purpose of the Act, as I read it, is to relieve them not merely from the hazard of ultimate loss, but from the hardships normally incident to the delays of winding-up proceedings, and for which, as everybody knows, an ultimate allowance of interest is very often an inadequate compensation.

The law was intended, as I think, to render the rights of depositors so clear as to be readily understood by all, and free from cavil or question in any quarter. It constitutes a clear and unequivocal tender of a benefit to every person who might contemplate becoming a depositor of a state bank in Oklahoma. Under § 8 every bank is permitted to advertise that its depositors are protected by the Depositors' Guaranty Fund. Every would-be depositor is thus directly referred to the terms of the law, and on reading it may learn that in the event of insolvency "the depositors of said bank or trust company shall be paid in full," etc.

It was said upon the argument that this promise, however unequivocal, is a "political" promise, and therefore not enforceable by suit. If it is a promise of the State of Oklahoma it of course is a "political" promise; otherwise not. But does not § 8 show most plainly that it is not

235 U. S. PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting.

at all a promise of the State, and is enforceable out of and only out of a fund kept upon deposit in the banks themselves and controlled by trustees whose salaries are, indeed, paid from the public treasury, but who are charged with no political function, and whose duties are owing solely to the banks and to depositors and others interested in the banks?

The failure of the statute to make any express provision for an action against the Banking Board at the suit of a depositor can hardly be deemed significant. This is taken care of in the Constitution, which declares (Art. 2, § 6): "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation."

That the fund is established for a public purpose through the exercise of the police power of the State does not, I submit, make the fund itself public property. It is closely analogous, I think, to the surplus of a mutual insurance company. The argument that the fund is public will hardly bear analysis. In one of the briefs it is expressed as follows: "The essence of the law, therefore, is not to establish a private right, but to serve public welfare; and as such no justiciable rights in the depositors are presumed to arise; the law was not primarily enacted to return to the depositor his money, but more properly to prevent the public injury by bank panics. Nowhere is there language used showing an intent to give to a depositor the right to sue." But, since bank panics are caused by the fear on the part of depositors that their money—that is, their ability to withdraw the money or otherwise realize upon their deposits—is in jeopardy, the argument pretty clearly defeats itself.

Not only has the State no part in the raising of the guaranty fund nor property in it, nor interest or responsibility in the distribution of it, nor even the remotest

PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting. 235 U. S.

reversionary right should the scheme prove a failure, but the Act contains no expression of a purpose that the public trustees are to be clothed with that immunity from private suit which is one of the prerogatives of sovereignty. There is nothing to suggest any participation by the State in the transaction, except that § 6 declares that "The State shall have for the benefit of the Depositors' Guaranty Fund a first lien upon the assets of said bank," etc., and that "such liabilities may be enforced by the State for the benefit of the Depositors' Guaranty Fund." But does not this plainly show that the State is to be a merely nominal party, and that the fund alone is the real beneficiary? It seems to me the language naturally imports the familiar action brought in the name of one but for the sole use of another; an action in which the nominal plaintiff at the same time avows that he has no interest in the proceeds. I cannot find in § 6, or elsewhere, anything to suggest that the State is to be an active agent in the matter, otherwise than as the Bank Commissioner and Banking Board act therein.

It is argued that the Board is endowed with discretionary powers in respect to the administration of the fund. I concede that the Act implies a considerable latitude of administrative discretion with respect to the care and management of the fund; but it is quite different with the provision for the payment of depositors. Here the plain mandate is: "Pay in cash, so far as you have it, and give certificates of indebtedness or warrants to the extent that the cash falls short." The argument in behalf of appellants goes to the length of saying: "It (the fund) may be used not only to pay the depositors of failed banks, but frequently to aid banks while in a failing condition. All of the fund which may be available at a particular time might, in the judgment of the Banking Board, be better used to aid disabled banks than to be

235 U. S. PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting.

applied to the immediate payment of depositors of a particular bank which had already been taken into the custody of the Bank Commissioner. In this way the available funds might be withdrawn by the Banking Board, in the exercise of its discretion, from the payment of a failed bank," etc. As showing the results to which the argument for discretionary powers with respect to paying depositors logically leads, this is illuminating; but if anything is clear in the letter and spirit of this enactment, it is that the legislature by no means intended that the fund or any part of it should be subject to use in supporting banks while in a failing condition, or in any other form of hazardous enterprise.

And it would seem plain enough that an interest on the part of the State or a discretion on the part of the Banking Board ought not to be read into the Act by construction, when the result is, not to make the promised guaranty more clear or more readily enforceable by the depositors, but, on the contrary, to render it unenforceable except with the consent of the State, and therefore materially less valuable to the depositors than otherwise it would be.

It is submitted that for the proper interpretation of the statute—or, for its construction if construction be needed—we should observe the fundamental rules that apply to contracts; for while there is disagreement upon the question whether the State is a party to it, we all agree that the Act prescribes a contract, and one of wide importance, between the banks and the depositors, and that the public interest is as much concerned in seeing it carried out and enforced according to its true intent and meaning as in requiring that the contract be made. Not only has the State obliged the banks to make this contract with their depositors, but in the law it has expressed the terms in which it shall be made. The courts, therefore, ought by all means to adopt an interpretation such as reasonably

PITNEY, DAY, VAN DEVANTER, LAMAR, J.J., dissenting. 235 U. S.

would have been placed and presumably was placed upon the statute by ordinary bankers and bank depositors in advance of judicial interpretation; reading it according to the fair import of its terms, without resort to legal subtlety in order to overthrow or weaken it, but seeking rather to uphold it and give it effect, "*Ut res magis valeat quam pereat*"; and if construction be needed, adopting that meaning which the promisor had reason to believe the promisee relied upon in accepting the offer. 2 Kent Com. * 557; *The Binghamton Bridge*, 3 Wall. 51, 74; *Ewing v. Howard*, 7 Wall. 499, 506; *Empire Rubber Mfg. Co. v. Morris*, 73 N. J. Law, 602, 610; *Gunnison v. Bancroft*, 11 Vermont, 490; *Jordon v. Dyer*, 34 Vermont, 104, 80 Am. Dec. 668; *Barlow v. Scott*, 24 N. Y. 40, 42; *Tallcot v. Arnold*, 61 N. Y. 616; *White v. Hoyt*, 73 N. Y. 505; *Chamberlain v. Painesville & Hudson R. R.*, 15 Oh. St. 225, 246; *County of Clinton v. Ramsey*, 20 Ill. App. 577, 579.

I cannot resist the conviction that this legislation was intended to convey and did convey to the banks and to intending depositors the understanding that the deposits were to be secured by the Fund and not by the State, that in the event of the insolvency of any bank its depositors were to be paid in full, without delay and without "ifs" or "ans," out of the cash in the Fund, or at worst by delivery of interest-bearing certificates of indebtedness capable of being sold for cash and payable in consecutive order as issued, and that the duty imposed upon the Banking Board to thus pay off the depositors without regard to the ultimate outcome of the liquidation of the particular bank would be enforceable, if need be, by process out of the courts of justice. It savors of repudiation to read into the scheme an unexpressed condition that renders the promise unenforceable by any means within the command of the promisee.

Let us now examine the state decisions in their order.

235 U. S. PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting.

State ex rel. Taylor v. Cockrell (1910), 27 Oklahoma, 630; 112 Pac. Rep. 1000. This was an action for a writ of mandamus instituted upon the relation of the "State Examiner and Inspector" (a constitutional officer with large powers, in the performance of which he is independent of the Chief Executive), to require the state bank commissioner to permit relator to examine the records and accounts pertaining to the collection and disbursement of the depositors' guaranty fund and the assets of failed or insolvent banks. Relator invoked a statute which declared: "The Examiner and Inspector shall examine the books and accounts of state officers whose duty it is to collect or disburse funds of the State, or (under) its management at least once each year." As the court said (27 Oklahoma, 632), the sole question involved was whether relator was authorized under the law to examine these records. The court's response was succinctly expressed,—“That the Bank Commissioner is a state officer has not been and cannot be questioned. That the depositors' guaranty fund, and the funds of a failed bank in the hands of a Bank Commissioner for the purpose of reimbursing the depositors' guaranty fund, is as much a fund of the State as the common school fund is also true. . . . The title of such depositors' guaranty fund vests in the State just as much so as the common school lands, or the proceeds of the sale of the same, and the taxes levied and collected for the maintenance and support of said schools, all of which are held in trust by the State for a specific purpose. Even if it were not a state fund, it would at least be a fund under the management of the State.” I cannot see that this amounts to the placing of a construction upon the statute in any respect pertinent to the question now before us. The decision was in effect that the depositors' guaranty fund was under the management of the State through the bank commissioner, a state officer, and that, therefore,

PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting. 235 U. S.

the accounts of the latter were subject to examination by the Examiner and Inspector by the terms of the statute that defined his duties. Treating it as a decision that the *title* of the fund is in the State, within the meaning of that statute, this is very far from holding that the *real ownership* of the fund is in the State, so as to clothe the managers of the fund with immunity from suit in a controversy raised by one of the stated beneficiaries. The decision rather puts the Bank Commissioner in a subordinate position than in one that entitles him to participate in the sovereign's immunity from responsibility to action in the courts of justice.

Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co. (1912), 33 Oklahoma, 535; 126 Pac. Rep. 556. The bank commissioner applied to a state court for orders in connection with the administration of the affairs of an insolvent bank of which he was in possession, and prayed that the creditors and depositors be granted all relief to which they might be entitled. The Fidelity & Guaranty Company filed its petition in intervention, alleging that it had signed, as surety for the bank, a bond to the State of Oklahoma for the sum of \$50,000 to protect the State against loss by reason of a deposit in the bank of certain funds in possession of the commissioners of the land office; and that the bank commissioner since taking charge of the assets of the bank had acted under the direction and control of the State Banking Board, and had paid the claims of other depositors in full without in any way protecting the deposit for which the intervening petitioner was surety. The trial court rendered a decree directing the bank commissioner to treat the amount due the commissioners of the land office as a deposit and pay over to said depositors their *pro rata* share of the assets. The Supreme Court, upon a review of other legislation (Comp. Laws, 1909, § 7943) relating to the custody and investment of the permanent school

235 U. S. PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting.

funds of the State in the hands of the commissioners of the land office, which provided (*inter alia*) that they might be deposited in bank upon security being given, held that such a deposit of the State's money was not within the purview of § 3 of the Guaranty Fund Law, and hence that the surety was not entitled to relief. In the course of reaching this conclusion the court held (p. 540) that the surety, having responded to the invitation implied in relator's prayer for relief in behalf of creditors and depositors, was entitled to "maintain its petition of intervention, and have its rights, if it has any, in relation to the bank guaranty fund, determined without having previously paid the penalty of its bond." There was no intimation that the Bank Commissioner was clothed with immunity from action, or endowed with any discretion that rendered it inappropriate that he should be sued.

Lankford, Com'r, v. Oklahoma Eng. & Ptg. Co. (1913), 35 Oklahoma, 404; 130 Pac. Rep. 278. The court simply held that a "merchandise creditor" of a defunct bank was not entitled to share *pro rata* with the depositors in the distribution of the assets.

It will be observed that both of the two latter cases were decided upon the merits of the intervenor's claims; upon grounds inconsistent, indeed, with the immunity from suit that is now asserted.

The last-mentioned decision was subsequent to the time when the rights of the present plaintiff accrued; the cases in 27 and 33 Oklahoma were decided before that time.

Another case, decided not only after the cause of action accrued but *after this court acquired jurisdiction* by the taking of the appeal, is *Lovett et al., Commissioners, v. Lankford* (September 29, 1914, 145 Pac. Rep. 767). Here the Supreme Court of Oklahoma has distinctly held that a petition for mandamus brought by a depositor against the State Banking Board to require payment of the de-

PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting. 235 U. S.

posit is in effect a suit against the State, and that the Board is a part of the executive branch of the government charged with the exercise of judgment and discretion in the administration of the law, so that their acts cannot be controlled by mandamus. This, of course, is directly in favor of the contention of the present appellants. Ought it to control our decision? What are the grounds upon which the state court proceeded? (a) Citing the language of the Act that gives to the State a first lien upon the assets of the Bank, and invoking the authority of *State ex rel. Taylor v. Cockrell*, 27 Oklahoma, 630, 633 (*supra*), the court holds that a judgment in favor of the depositor "would directly affect the State, and would, in effect, be a judgment against the State, and would require the subjection of state funds to satisfy said judgment." This treats the word "title" as equivalent to "ownership." I have endeavored to show that this is inconsistent with the language and purpose of the Act, and that state ownership renders the Act, in its other and essential provisions, inconsistent with the limitations found in the state constitution. (b) The court cites *Murray v. Wilson Distilling Co.*, 213 U. S. 151. For reasons already indicated, it seems to me this case is clearly distinguishable. (c) It is said that the failure of the legislature to make specific provision for review in the courts of the action of the Banking Board concerning claims against the guaranty fund tends to prove a legislative purpose to give exclusive jurisdiction to the Board. As already shown, it would be a work of supererogation for the legislature to specifically provide for an action in the courts; for, if the statute confers a right upon the depositor, art. 2, § 6 of the state constitution provides a remedy. And I find nothing in the Act that expressly or by reasonable implication confers any judicial jurisdiction upon the Board. Exclusive jurisdiction in that body seems plainly inconsistent with the same constitu-

235 U. S. PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting.

tional provision. (d) After quoting from the 1st section of the Act, which gives to the banking board supervision and control of the fund, with power to adopt necessary rules and regulations, not inconsistent with law, for its management and administration, and after quoting the other pertinent sections that are set forth in the marginal note, *supra*, the court cites *Lankford v. Oklahoma Engraving & Printing Co.*, 35 Oklahoma, 404, *supra*, as authority for holding that under § 6 (303) it is the duty of the Banking Board and the Bank Commissioner to determine the validity of claims against the fund, and that: "By this section, it is not only their duty to determine when a claim is valid against the bank, but they must further determine whether such claim is protected and required to be paid from the depositors' guaranty fund." I am unable to find any provision of this kind in the statute; and the case cited, far from holding that these questions are confided to the decision of the Board or the Commissioner, is directly to the point that such questions are properly to be decided by the courts; and to the same effect is the case from 33 Oklahoma, cited above.

For these reasons, it is submitted that the decision just referred to ought not to be followed by this court in the present case. Laying that on one side, and adopting that view of the statute above indicated as being in accord with its letter and spirit, there appears to be no legal or constitutional obstacle in the way of affirming the present decree.

For, if the action is not nominally or in effect a suit against the State, is not brought to enforce any liability or duty of the State or interfere with its property, but has for its object merely to require public officers to perform a plain official duty, not of a political nature, owing to a special class of persons among whom the plaintiff is included, it is not properly to be deemed a suit against the State within the prohibition of the Eleventh Amend-

PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting. 235 U. S.

ment. We are referred by appellant's counsel to *Louisiana v. Jumel*, 107 U. S. 711; *Cunningham v. Macon & Brunswick R. R.*, 109 U. S. 446; *Hagood v. Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443; *N. Y. Guaranty Co. v. Steele*, 134 U. S. 230; *Pennoyer v. McConnaughy*, 140 U. S. 1, 10; *Smith v. Reeves*, 178 U. S. 436; and similar cases. But there is a broad distinction, uniformly recognized by this court, which, as it seems to me, takes the present action out of the prohibition of the Eleventh Amendment. It was well expressed in *Board of Liquidation v. McComb*, 92 U. S. 531, 541, where the court, by Mr. Justice Bradley, said: "The objections to proceeding against state officers by mandamus or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it." In the *Jumel Case*, 107 U. S. at p. 727, Mr. Chief Justice Waite said: "The relators do not occupy the position of creditors of the State demanding payment from an executive officer charged with the ministerial duty of taking the money from the public treasury and handing it over to them, and, on his refusal, seeking to compel him to perform that specific duty." In the *Cunningham Case*, 109 U. S. at p. 452, Mr. Justice Miller, in describing

235 U. S. PITNEY, DAY, VAN DEVANTER, LAMAR, JJ., dissenting.

the class of cases in which public officers may be sued, said: "A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process." In *Rolston v. Missouri Fund Commrs.*, 120 U. S. 390, 411, Mr. Chief Justice Waite said: "It is next contended that this suit cannot be maintained because it is in its effect a suit against the State, which is prohibited by the Eleventh Amendment of the Constitution of the United States, and *Louisiana v. Jumel*, 107 U. S. 711, is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the State. The law makes it his duty to assign the liens in question to the trustees when they make a certain payment. The trustees claim they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. The only inquiry is, therefore, as to the fact of a payment according to the requirements of the law. If it has been made, the trustees are entitled to their decree. If it has not, a decree in their favor, as the case now stands, must be denied; but as the parties are all before the court, and the suit is in equity, it may be retained so as to determine what the trustees must do in order to fulfill the law, and under what circumstances the Governor can be compelled to execute the assignment which has been provided for." In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 390, where it was objected that the suit was in effect a suit against the State of Texas, the court, by Mr. Justice Brewer, said: "There

is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered."

Finally, this is an equitable action brought to establish and enforce a trust in favor of plaintiff, with only an incidental prayer for a mandatory decree. It is not an original proceeding by mandamus, of which the Federal courts have no jurisdiction. *Bath County v. Amy*, 13 Wall. 244; *Jordan v. Cass County*, 3 Dill. 185; Fed. Cas. No. 7517; *County of Cass v. Johnston*, 95 U. S. 360, 370; *County of Greene v. Daniel*, 102 U. S. 187, 195; *Davenport v. County of Dodge*, 105 U. S. 237, 242.

It seems to me that the decree should be affirmed.
